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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

DODD *v.* CATTELL.

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March 19, 26.

[1912 D. 488.]

Partition—Jurisdiction—No Joint Tenancy or Tenancy in Common—Overriding Term.

A part owner of land who is not a coparcener, a joint tenant, or a tenant in common is not entitled to a partition.

Where land is subject to an overriding term limited upon trusts for management which require the possession of the entirety to remain in the trustees, there is no right to a partition during the continuance of those trusts.

Testator by his will settled real estate upon certain trusts under which, in the events which had happened, the plaintiff was entitled, subject to a term of 1000 years, to the entire estate in fee simple, subject, however, as to one moiety thereof to have her estate divested by the attaining of a vested interest therein by other persons. The term was limited to trustees upon certain trusts for management and application of the rents under which, in the events which had happened, one moiety of the rents thereof was payable to the plaintiff together with a part of the other moiety.

In an action by the plaintiff for partition of the estate:—

Held, that the plaintiff was not entitled to a partition on the grounds (1.) that there was no joint tenancy or tenancy in common, and (2.) that the trusts for management required that the entirety of the property should remain in the trustees.

Principle stated by Cotton L.J. in *Taylor* v. *Grange* (1880) 15 Ch. D. 165, 168, applied.

ACTION.

This was an action by Mrs. Gladys Dodd claiming (inter alia)

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partition of the residuary real and leasehold estate of Thomas Cattell between the plaintiff as indefeasibly entitled to the income and capital of one undivided moiety of such estate on the one hand and the defendant Frederick Samuel Cattell and all other persons (including the plaintiff) now or hereafter entitled to or interested in the income or capital of the other or settled moiety of such estate on the other hand.

The plaintiff was the only child of Thomas Randoll Cattell (a deceased son of the testator), who had attained twenty-one.

The defendants to the action were Samuel Kington Cattell (another son of the testator), John James Bedney Arter and Harry York Madeley (the trustees of a term of 1000 years created by the will of the testator), and Frederick Samuel Cattell and Irene Cattell (the two infant children of the defendant Samuel Kington Cattell). The defendant Irene Cattell was in fact born after the commencement of the action, but was directed by the Court to be added as a defendant and was treated as having been so added for the purposes of the action.

The following statement of the facts is taken from the judgment of Warrington J.:—"By the will of Thomas Cattell his freehold and copyhold estates were limited to the use of certain trustees for 1000 years upon trusts afterwards declared and subject thereto to the use of all the children of his son Thomas Randoll Cattell and of every or any other son of the testator which children should be living at the testator's death or born afterwards, and, being a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters, should attain that age or marry under that age (including any such child or children who should be born after any one or more such child or children should have attained a vested interest), and their heirs and assigns for ever as tenants in common per stirpes so that as between the respective families of the testator's sons the total share devolving on each family might be equal and might be equally sub-divided between the children being members of that family and become entitled under the limitation.

"There were five sons, but three have died unmarried. There can, therefore, be no more than two stirpes. The plaintiff, the only representative of her stirps, has attained twenty-one, and

claims to be indefeasibly entitled (subject to the term) to one moiety of the estates. She claims that the other moiety is also (subject to the term) vested in her, but in this case subject to be divested in case the infant defendants or one of them or any other child of Samuel Kington Cattell attains a vested interest. The trusts of the term were, so far as material, as follows. After a trust to permit the testator's wife, who is now dead, to occupy a certain messuage the trust proceeds as follows: Upon trust during the suspense of indefeasible vesting of the said hereditaments and premises comprised in the said term of 1000 years or of any share thereof to enter into possession and receive the rents and profits of and manage the entirety of the same hereditaments and premises as in the will is mentioned. Then after trusts for the raising and payment of certain annual sums and sums in gross, all of which have either determined or been raised or provided for, the will proceeds as follows (clause (H) of paragraph 4 of the statement of claim): Upon further trust after the death of any son of the testator and during the minority of any one or more of the children of such son to apply the whole or so much as his trustees or trustee should think fit of the rents and profits of the said premises not exceeding as to any child the share of such rents and profits to which such child would be entitled if the said rents and profits were divided among all the children then living and the representatives of such as should have previously died (having been alive at the testator's death or born afterwards and having as to sons attained the age of twenty-one years and as to daughters attained that age or married) of any of the testator's sons (whether living or deceased) in equal shares per stirpes in or towards the education or maintenance of such minor child as therein mentioned. That trust has now come to an end of course so far as the plaintiff is concerned. It has not yet arisen in the case of the infant defendants, but it will arise when Samuel Kington Cattell dies if any of the infant defendants should then be under twenty-one. The testator then declared as follows (clauses (I), (J), (K) and (L) of paragraph 4 of the statement of claim): (I) That subject to and after answering the several trusts and purposes thereinbefore declared and expressed (including the payment of interest on any money raised

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by mortgage under the trusts of the said term) the rents and profits of the said premises comprised in the said term of 1000 years or so much thereof as should not be required for answering any of the trusts and purposes aforesaid or any part of such surplus rents and profits might during the suspense of indefeasible vesting of the said premises or of any part thereof under the ultimate limitation thereof thereinbefore contained be applied by the said trustees or trustee in or towards the satisfaction and discharge of the several principal or gross sums thereinbefore directed to be raised out of the same premises or of any mortgages or charges which might have been effected for raising such sums or any of them and for better effectuating that object the said trustees might retain any such surplus rents and profits and invest the same in any such mode as aforesaid and invest and accumulate the resulting income so as to form by anticipation a fund for the payment of any such sums and sum when wanted and for paying off any mortgages or charges which should have been actually effected. And that any such accumulated fund if not actually wanted and applied for the purposes aforesaid or any of them should eventually be added to and sink into the testator's residuary personal estate and be applicable upon the trusts thereinafter declared concerning the same. (J) And that the ultimate surplus of the rents and profits of the premises comprised in the said term of 1000 years which should remain after answering the several purposes aforesaid and after reimbursing the trustees all costs and expenses incurred in relation to the execution of the trusts annexed to the said term should during the suspense of indefeasible vesting of the said premises or any part thereof under the ultimate limitation thereof thereinbefore contained be applicable as follows (that is to say):—(K) Whensoever there should be living any child or children of any son or deceased son of the testator or there should have been any such child or children who being living at the testator's death or born afterwards should have died as to a son after attaining the age of twenty-one years or as to a daughter after attaining that age or marrying then such ultimate surplus of the said rents and profits should from time to time be paid or appropriated to and divided between all the children who should for the time being

be living of any son or deceased son of the testator and the executors and administrators of every or any deceased child of any son or deceased son of the testator which child should have been living at the testator's death or born afterwards and being a son should have attained the age of twenty-one years or being a daughter should have attained that age or married under that age (as personal estate of such deceased child) in equal shares per stirpes. But so nevertheless that as to the share of any minor child of a deceased son of the testator any payments during the current year for or towards the maintenance or education of such child under the power thereinbefore contained should be taken into account as part of the share of such child under the trust lastly thereinbefore declared and that with regard both to the residue of the share appropriated to any minor child of a deceased son of the testator and to the share appropriated to any minor child of a son of the testator then living the same should during such minority be accumulated as therein mentioned and every such accumulated fund might be applied for or towards the satisfaction and discharge of any of the principal sums thereinbefore directed to be raised out of the said premises or of any mortgages or charges effected for raising such principal sums or any of them and if and so far as not so applied should at the expiration of the period of accumulation thereof sink into the testator's residuary personal estate and be held upon the trusts thereinafter declared concerning the same. (L) And if and whenever there should not be living any child of any son or deceased son of the testator and there should not have been any such child who (being living at the death of the testator or born afterwards) should have died as to a son after attaining the age of twenty-one years, or as to a daughter after attaining that age or marrying then the testator declared that the said ultimate surplus of the said rents and profits should from time to time be paid and appropriated to and divided between such of his sons as should for the time being be living n equal shares the share of any son who should be a minor to be accumulated for his benefit as expressed in the will. With regard to these provisions the direction in clause (I) as to the discharge of charges is no longer operative, and in clause (L) the

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final trust for the testator's sons cannot now take effect, the plaintiff having attained twenty-one.

"The residuary personal estate of the testator was directed to be held upon certain trusts for conversion and investment, and then as to the residue and the income thereof upon such trusts and with and subject to such powers provisoes and declarations as should correspond with the uses, trusts, provisoes and declarations thereinbefore limited and declared of and concerning the freehold premises comprised in the said term of 1000 years and the rents and profits thereof as nearly as the rules of law and equity would permit, but not so as to increase or multiply charges or powers of charging. The will conferred on the trustees extensive powers of leasing exercisable by the trustees during the suspense of indefeasible vesting of the premises comprised in the term of 1000 years or any part thereof.

"On attaining twenty-one the plaintiff was let into possession or receipt of the rents and profits of the estate, there being then in existence no other person but herself who could become entitled to any interest therein. The trusts for accumulation during the minorities of the infant defendants had been held to be valid. (1) Their shares not being indefeasibly vested, the trustees, after the birth of the defendant Frederick Samuel Cattell, pursuant to an order of November 12, 1912, resumed possession and receipt of the rents and profits of the estate. The plaintiff is entitled to one moiety of the surplus rents under clause (K). She has also been held to be entitled to one half of the accumulations of the other moiety of the rents, and to be therefore entitled to stop such accumulations as regards that one half of the second moiety and to receive that further proportion of the surplus rents themselves, but this last half is of course subject to those directions in the will which precede the direction to accumulate, for example the direction as to maintenance of the infant defendants when, if at all, it takes effect."

The plaintiff based her claim to invoke the jurisdiction of the Court on the following allegations contained in her statement of claim:—

Par. 29. "Having regard to the circumstances aforesaid there

(1) *In re Cattell* [1914] 1 Ch. 177.

are no longer any subsisting or effective trusts of the aforesaid term of 1000 years except trusts for the receipt and division of the rents and profits and income thereof under which the plaintiff is absolutely and indefeasibly entitled to receive at least a moiety of the said rents and profits. The plaintiff is also absolutely and indefeasibly entitled to a moiety of the inheritance and fee simple or other the absolute estate and interest (subject to the said term of 1000 years) of and in the said residuary real and leasehold estate the other moiety thereof being as the result of the declarations in the last stated order"—that was an order under the Settled Land Act declaring that the infant defendant Frederick Samuel Cattell was a person who would if of full age have the power of a tenant for life—"subject to a settlement under which the defendant Frederick Samuel Cattell or the defendant trustees on his behalf have the powers of a tenant for life."

Par. 30. "The plaintiff desires and it would be for her benefit and for that of all persons beneficially entitled to the residuary real and leasehold estate of the testator that the same should be partitioned in moieties between the plaintiff as absolutely entitled as aforesaid to one moiety on the one hand and the persons entitled to the moiety subject to the settlement last aforesaid on the other hand."

Cave, K.C., and *Sir P. Baker-Wilbraham*, for the plaintiff. Under the will the plaintiff is, in the events which have happened, entitled, subject to the term, to the entire estate in fee simple, subject, however, as to one moiety to have her estate divested by the attaining of a vested interest therein by other persons. The Court has already held that she is absolutely entitled to a moiety of the residuary personal estate, and this has actually been transferred to her. Under these circumstances, it is submitted, she is entitled to a partition. It is said, however, that there are active trusts to be performed by the trustees of the term and that she is not therefore entitled to a partition, and *Taylor* v. *Grange* (1) will be relied on. But it is submitted that there are here no active trusts to be performed

(1) (1879) 13 Ch. D. 223; 15 Ch. D. 165.

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by the trustees as regards the plaintiff's moiety except a trust to pay her the rents. Then it may be said that other beneficiaries may come into existence; but in *Wills* v. *Slade* (1) it was held that it was no objection to a partition that other persons might come into esse and be entitled.

[WARRINGTON J. referred to *Biggs* v. *Peacock* (2) and *In re Tweedie and Miles.* (3)]

In those cases there was a trust for sale.

Then it is said that freeholds cannot be partitioned because there is no joint tenancy or tenancy in common in the fee simple. But the plaintiff is indefeasibly entitled to one moiety and defeasibly entitled to the other moiety. If she were not defeasibly entitled to the other moiety she would clearly be entitled to a partition.

[WARRINGTON J. Can a person entitled in remainder expectant on a life estate obtain a partition?]

No. There must be possession. Here the plaintiff is presently entitled to one moiety of the rents and there are no active trusts to be performed.

In the alternative it is submitted that the plaintiff is entitled to a partition of the term—*Baring* v. *Nash* (4); *Heaton* v. *Dearden* (5)—in which case she can enlarge it under s. 65 of the Conveyancing Act, 1881.

[WARRINGTON J. I doubt if the plaintiff would come within the description of the parties who would be entitled to enlarge a term.

Clauson, K.C. There is no legal estate in the infant defendants. The whole legal estate is vested in the plaintiff, and it is that which occasions the difficulty.]

The Court has already declared that the infant defendants are persons who if of full age would have the powers of a tenant for life under the Settled Land Acts. Therefore it is clear that a partition could be made by the trustees under s. 3, sub-s. (iv.), of the Settled Land Act, 1882. If this is so, surely the Court has jurisdiction to decree a partition.

(1) (1801) 6 Ves. 498.
(2) (1882) 22 Ch. D. 284.
(3) (1884) 27 Ch. D. 315.
(4) (1813) 1 V. & B. 551.
(5) (1852) 16 Beav. 147.

Clauson, K.C., and *A. Underhill*, for the trustees. The duty of the trustees is to protect the interests of unborn children. The trustees merely desire to point out the difficulties which stand in the way of the Court granting the plaintiff's application. First, the jurisdiction of the Court to partition, except in the case of coparceners, is statutory. The statute of 31 Hen. 8, c. 1, enabled joint tenants and tenants in common to obtain partition in the same manner as coparceners. By the statute of 32 Hen. 8, c. 32, the power to partition was extended to the case of persons having particular estates for life or years. That is the sole jurisdiction of the Court. In *Taylor* v. *Grange* (1) it was suggested that where persons were entitled to call for the legal estate they might obtain partition. So far as the fee simple is concerned there are neither coparceners, joint tenants, nor tenants in common.

As to the term, the plaintiff asks that it may be partitioned in order that she may enlarge it under the Conveyancing Act, 1881, but she is not entitled to call for the term. Under the term the plaintiff is not entitled to the rents and profits of half the estate, but to half the rents and profits of the whole estate. There is here no undivided share, and s. 3, sub-s. (iv.), of the Settled Land Act, 1882, has no application.

H. Terrell, K.C., and *Dighton Pollock*, for the infant defendants. The argument on behalf of the plaintiff is based on this, that the plaintiff if absolutely entitled to a moiety of the estate can obtain a partition. There is no greater jurisdiction in equity than there was at common law. The Court of Chancery never assumed to do more than the common law could do, but in her modesty she said she did it better. The plaintiff to succeed must shew that she has the legal estate in a moiety of the property as coparcener, tenant in common, or joint tenant: *Taylor* v. *Grange*. (2) Here the entire fee simple at law is at present vested in the plaintiff. The Court has only a very limited jurisdiction. Under the trusts of the term the trustees have to receive the rents and profits of the entirety of the property. During the suspension of the indefeasible vesting of any share they have to manage the whole of the property. *Macculloch* v.

(1) 13 Ch. D. 223; 15 Ch. D. 165. (2) 15 Ch. D. 167.

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Anderson (1) illustrates the distinction between the income of half an estate and half the income of the whole estate. It is submitted that the plaintiff is not entitled to a partition during the existence of the term.

Cave, K.C., in reply.

[WARRINGTON J. I think the real difficulty arises from the fact that the plaintiff is not at present seised of an undivided moiety.]

No one is compelled to remain in partnership with another against his will: 1 White and Tudor's Leading Cases in Equity, 8th ed. p. 207. The plaintiff's case cannot be put better than it is put in paragraph 29 of the statement of claim. It is of vital importance to the plaintiff to have the term partitioned, otherwise she will only be entitled to receive the rents during her life. The trustees now stand possessed of the term upon trust to pay a moiety of the rents of the property to the plaintiff and the other moiety to other persons. They are bare trustees of the rents for the plaintiff. They have no active duties to perform except to pay them to the plaintiff. An order for the partition of property can be made notwithstanding the existence of a power given to trustees to sell the property for the purpose of a division: *Boyd* v. *Allen*. (2) The powers of leasing given to the trustees under this will do not go further than the power to sell in that case. *Macculloch* v. *Anderson* (1) is distinguishable because there was there a future trust for sale.

Cur. adv. vult.

March 26. WARRINGTON J. read the following judgment:— This is an action for partition of a freehold and copyhold hereditament, formerly the property of Thomas Cattell, deceased. Leaseholds were settled by his will on corresponding trusts, but I understand that in fact there are now no leaseholds. The plaintiff is the only child who attained twenty-one of Thomas Randoll Cattell, a son of Thomas Cattell and now deceased. The defendants are (1.) the trustees of a term of 1000 years created by the will of Thomas Cattell, and (2.) the two infant children of the defendant Samuel Kington Cattell, a son of Thomas Cattell.

(1) [1904] A. C. 55. (2) (1883) 24 Ch. D. 622.

The question is whether the Court has jurisdiction to order a partition of the estates. [His Lordship stated the facts as above set forth, and continued:] Under these circumstances has the Court jurisdiction to order a partition either of the fee simple of the estates or of the estates during the term? In the case of coparceners the jurisdiction existed at common law. By the statute of 31 Hen. 8, c. 1, it was extended to cases of joint tenants and tenants in common in fee, and by the statute 32 Hen. 8, c. 32, it was further extended to the case of joint tenants or tenants in common for life or years, or where one was entitled for life or years. The jurisdiction of the Courts of Equity is a concurrent jurisdiction only, and was resorted to, I believe, owing to the existence of machinery in those Courts more convenient for the purpose than the writ of partition, the only engine available to Courts of Common Law. But in Courts of Equity as well as in those of Common Law the existence of a joint tenancy or a tenancy in common is essential to the jurisdiction. Moreover, although I believe the mere fact that estates are equitable and not legal would not stand in the way in these Courts, yet if there is any active overriding trust which cannot be put an end to by some only of the persons entitled the jurisdiction will not be exercised: see *Taylor* v. *Grange* (1) and *Biggs* v. *Peacock*. (2) The statement of claim contains the following allegations on which the plaintiff founds her claim to invoke the jurisdiction. [His Lordship read paragraphs 29 and 30 above set forth, and continued:] She then claims partition of the estates. At the Bar she divided this into two alternative claims first as to the fee simple and secondly as to the estates for the duration of the term of 1000 years. With regard to the fee simple I am of opinion that the claim fails on two grounds, first that there is no tenancy in common, and secondly that there is an active overriding trust.

As to the first point, the true result of the dispositions of the will and the events which happened is that the plaintiff is now entitled subject to the term to the entire estate in fee simple, but is liable as to one moiety to have her estate divested by the attaining of a vested interest by one of the children of Samuel

(1) 13 Ch. D. 223; 15 Ch. D. 165. (2) 22 Ch. D. 284.

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Kington Cattell. There is therefore at this moment no joint tenancy or tenancy in common.

As to the second point, the testator has directed that in the state of things now existing the trustees should enter into possession or the receipt of the rents and profits not merely of a share but of the whole, and it is their duty under these trusts to manage the estates, to grant leases, and otherwise exercise the powers conferred upon them by the will. The infant defendants are entitled to say that these trusts shall be performed and the plaintiff is bound by the terms of the testator's will to allow them to be performed. The following passage from the judgment of Cotton L.J. in *Taylor* v. *Grange* (1) seems to be applicable in principle to the present case, although of course in that case the facts were somewhat different. Cotton L.J. says: "The difficulty is not simply that there is a legal estate outstanding, but there are active trusts to be performed which may for some purpose require, in order that the testator's intention should be carried into effect, that the property should remain as an entirety in the trustees during the continuance of those trusts, and the persons seeking a partition are not in a position, having regard to their estates and interests, to put an end to those trusts. Therefore they must take the property subject to the testator's will, and to the trusts which he has directed to be performed." The plaintiff, in my opinion, fails therefore as to the fee simple. Then she says, "at all events I am entitled to a partition of the estates during the continuance of the term of 1000 years." The answer to this claim is, in my judgment, that she is entitled under the trusts of the term to a share of the surplus rents and profits arising by the performance by the trustees of the trusts annexed to their possession of the estate, and that she is not a tenant in common with the trustees or with any one else of a share of the estate itself.

On the whole, the action so far as it seeks a partition fails.

Solicitors: *Collyer-Bristow, Curtis, Booth, Birks & Langley, for Forsyth, Bettinson & Co., Birmingham; Kingsford, Dorman & Co., for C. F. Price, Atkins & Price, Birmingham.*

(1) 15 Ch. D. 168.

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[1913 H. 126.]

Letters of Administration—Grant of—Sale of Real Estate by Administratrix—Subsequent Discovery of Will appointing Executors—Revocation of Letters of Administration—Grant of Probate to Executors—Validity of Purchaser's Title—Court of Probate Act, 1857 (20 & 21 *Vict. c.* 77), *ss.* 75, 77, 78—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 70—*Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *ss.* 1, 2, 11, 24.

Letters of administration were granted to the widow of a man who was erroneously presumed to have died intestate. The administratrix as personal representative of the deceased, by virtue of the Land Transfer Act, 1897, sold and conveyed to a purchaser a portion of the deceased's real estate. Upon the subsequent discovery of a will the executors thereby appointed obtained a recall of the letters of administration and a grant of probate to themselves. In an action by the executors to recover possession of the real estate sold by the administratrix:—

Held, reversing the decision of Astbury J. [1913] 2 Ch. 384, that the grant of administration was not void ab initio and that the purchaser had acquired a good title.

Held, also, that even if the grant of administration had been void for want of jurisdiction it was an order of the Court by virtue of which the purchaser's title would have been protected under s. 70 of the Conveyancing and Law of Property Act, 1881.

Graysbrook v. *Fox* (1565) 1 Plowd. 275; *Abram* v. *Cunningham* (1677) 2 Lev. 182; and *Ellis* v. *Ellis* [1905] 1 Ch. 613 overruled.

Appeal from a decision of Astbury J. (1)

On January 30, 1899, George Francis Hewson, the owner in fee simple of the Ovington Glebe Estate, Southampton, died without issue.

On June 13, 1899, after a diligent but unsuccessful search had been made for a will, general letters of administration were granted to his widow, who applied therefor under a genuine belief that her husband had died intestate.

On May 31, 1900, the estate (less four acres purchased by the administratrix) was offered for sale by auction "by order of the administratrix" subject to certain particulars and conditions of sale.

The property was not sold at the auction, but by a contract

(1) [1913] 2 Ch. 384.

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dated August 23, 1902, embodying the same particulars and conditions of sale, the administratrix agreed to sell the property to the defendant Sir John Shelley for 3500*l.*

By a conveyance dated October 13, 1902, and made between the administratrix of the one part and the purchaser of the other part, the administratrix "as personal representative of the said George Francis Hewson deceased by virtue of the powers conferred on her by the Land Transfer Act, 1897, and of every other power in this behalf her enabling and also in her individual capacity as to all estates or interests therein (if any) so vested in her" conveyed the estate to the purchaser in fee simple, and the purchaser took possession on the same day.

The administratrix died on September 2, 1911, having by her will, dated November 22, 1910, appointed one Davis to be her executor.

On November 11, 1911, in going through her papers her executor found a holograph will of G. F. Hewson which had slipped down between the back and shelves of certain pigeonholes in a desk or bureau in which G. F. Hewson had apparently placed it.

By this will, dated April 24, 1894, the testator G. F. Hewson bequeathed the Ovington Glebe Estate in trust for his wife for life and after her death to the plaintiff George Hewson on certain conditions therein mentioned. He appointed the plaintiffs, his wife, and another person, who renounced, his executors.

On February 9, 1912, the letters of administration were revoked and probate was granted to the plaintiffs.

On January 14, 1913, the plaintiffs as executors brought this action against the purchaser, his mortgagees, and the tenant of the property for possession and an account of the rents and profits since the widow's death. It was subsequently arranged that the tenant's name should be struck out as a defendant.

The defendants relied on the sale by the de facto administratrix, which they were entitled and indeed bound to assume was made in due course of administration and which they said was in fact so made.

The following additional facts relating to the actual administration of the estate were proved at the trial.

The statutory next of kin of G. F. Hewson were his widow, two nephews, and four nieces, three of the nieces being his co-heiresses.

On June 16, 1899, the solicitors of the administratrix wrote on her behalf to each of the three co-heiresses stating that at the time of G. F. Hewson's death it was confidently believed that he had made a will. They stated that it was known that at one time such a will was in existence and on his death-bed G. F. Hewson informed his wife that he had left everything to her. Every effort, however, to find any will had so far failed, and though it was possible that it might at some future time be found, the presumption at present was that G. F. Hewson must have destroyed his former will with the intention of making a new one, but that this intention was never carried into effect. In these circumstances and acting on this presumption the widow had taken out administration and was now about to administer unless prior to the actual division a will came to light. They then pointed out that the real estate would devolve on the co-heiresses subject to the widow's dower and informed them that it was of the poorest description and untenanted and was being farmed by a bailiff at a considerable loss, and that it was therefore imperative that it should be sold with as little delay as possible, and asking them to sign an enclosed authority for its sale, which was desirable if any advantage was to be derived from it.

The defendants objected that this letter was not evidence against them, but the objection was overruled.

It was also proved that prior to March, 1900, the estate duty, 188*l.*, on the realty was paid mainly out of the proceeds of sale of the four acres, and a small balance, about 15*l.*, out of the shares of personalty to which the widow and the co-heiresses were entitled, and that the debts and funeral expenses, which were trifling, had been discharged. The succession duty was also paid out of the shares of personalty.

On March 1, 1900, the real estate still remained subject to six half-yearly instalments of a land improvement charge against which G. F. Hewson had covenanted to indemnify his vendor. The total instalments amounted to 23*l.* 13*s.* 1*d.* These

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instalments were regularly paid by the administratrix in March and September.

On May 31, 1900, the date of the abortive auction, the liability was only 19*l.* 14*s.* 3*d.*

On August 23, 1902, the date of the contract, there was only one instalment left, namely, 3*l.* 19*s.*, which was paid by the administratrix on September 24, 1902, before completion, and on completion on October 13, 1902, the administratrix became entitled to a return of 40*l.* estate duty and 19*l.* succession duty overpaid on the real estate. The administratrix had, however, incurred a liability of 69*l.* 10*s.* to the auctioneers and solicitors for the abortive auction, and certain solicitors' charges, about 45*l.*, for subsequent attempts to sell the property and in connection with the final winding up of the estate, and which were quite independent of the scale fee on the actual purchase.

One-third of the net proceeds of sale was invested in 1394*l.* 11*s.* 8*d.* Consols to provide dower for the widow's life, and the residue was divided among the co-heiresses. The widow's dower fund was still intact and stood in the name of Davis, her executor, a member of the firm of solicitors acting for the plaintiffs and formerly acting for the widow. The plaintiffs were willing to hand over this fund in exchange for the title deeds.

Upon these facts Astbury J. gave judgment for the plaintiffs, on the ground that the title of the executors related back to the death of the testator, and that the grant of letters of administration and all acts done by the administratrix were void and of no effect. He considered that he was bound to come to this conclusion having regard to the authorities of *Graysbrook* v. *Fox* (1) and *Abram* v. *Cunningham* (2), which were followed by Warrington J. in *Ellis* v. *Ellis.* (3)

From this decision the defendant, Sir John Shelley, appealed.

Micklem, K.C., *W. M. Hunt*, and *H. S. Preston*, for the appellant. The learned judge in the Court below felt himself bound by the authorities to decide as he did, but we submit that this Court is not so bound, and that the judgment under appeal ought

(1) 1 Plowd. 275. (2) 2 Lev. 182.
(3) [1905] 1 Ch. 613.

to be discharged. The sale was in due course of administration, perfectly regular, and necessary to meet charges on the estate; although the ordinary debts were few and had been paid by the widow out of her own funds. She was obliged to take out letters of administration, and they were granted in the ordinary way; everything had been done with the most perfect good faith, and the learned judge has held that because a will which appointed executors was afterwards found the Court had no jurisdiction to make the grant, and that the grant and everything done under it were void ab initio. That is an impossible view at the present day. The authorities on which Astbury J. relied were *Graysbrook* v. *Fox* (1), *Abram* v. *Cunningham* (2), *Boxall* v. *Boxall* (3), and *Ellis* v. *Ellis*. (4) The first of those decisions never was right and at all events it is not law now. It was held that where administration had been granted, but a will which appointed an executor had been afterwards proved, the administration was absolutely void ab initio, and dispositions of the assets by the administrator were void also. But Walsh J. said (at p. 282) that alienations of assets for the purpose of paying funeral expenses and debts would not be avoided: a statement which is quite inconsistent with the total avoidance of the administration. Until the will was found the Court had power to grant letters of administration, and when the will was found and proved the powers of the administrator ceased: Year Book 7 Edw. 4, 12b, 13; Fitzherbert's Abridgment, 1577; Brooke's Abridgment, 1587; Rolle's Abridgment, 907; Burn's Ecclesiastical Law, 9th ed. vol. iv. p. 312; Viner's Abridgment, 2nd ed. vol. xi. p. 66. But acts done by the administrator in due course were valid. Further, it seems that in *Graysbrook* v. *Fox* (1) the existence of a will was known from the first.

The next case is *Abram* v. *Cunningham*. (2) That was decided on the ground that there was no jurisdiction to appoint an administrator whilst there was an executor named in the will who had not renounced. The only question was whether the admitted flaw in the title was cured by the subsequent

(1) 1 Plowd. 275.
(2) 2 Lev. 182; 2 Mod. 146; Freem. K. B. 445.
(3) (1884) 27 Ch. D. 220.
(4) [1905] 1 Ch. 613.

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renunciation of the executor. In *Boxall* v. *Boxall* (1) no executor was appointed by the will and the will itself was intentionally suppressed. There was no conflict between executor and administrator, and the sale was in fact upheld. The decision in *Ellis* v. *Ellis* (2) can be supported on the ground of fraud; and the attention of Warrington J. was not called to the authorities on the other side. Letters of administration were obtained in *Woolley* v. *Clark* (3) by fraud.

There is a line of cases to the contrary effect supporting the proposition stated in Burn's Ecclesiastical Law, 9th ed. vol. iv. p. 312, to the effect that in circumstances like the present, if it is not known that there is a will, or if the will is concealed, the letters of administration are not void ab initio, but are good until the will is proved: *Doyle* v. *Blake*. (4) This doctrine is consistent with the well-established practice of granting limited administrations of many kinds: Burn's Ecclesiastical Law, 9th ed. vol. iv. p. 375, and cases there cited; Tristram and Coote's Probate Practice, 13th ed. p. 121. An administrator durante minore ætate has, for the time, all the powers of an ordinary administrator, including a power to sell the estate of the deceased for payment of debts: *In re Cope*. (5) The same rule applies to administration pendente lite: *Frederick* v. *Hook* (6); *Walker* v. *Woollaston* (7); *In the Goods of Campbell* (8); *In the Goods of Wright*. (9) If a person named as executor cannot be found the Court will grant administration: *In the Goods of Sawtell*. (10)

Since the Land Transfer Act, 1897, an administrator has practically the same powers over real estate that he has over personalty and chattels real. The question is who is the "personal representative" within s. 1, sub-s. 1. It must be the person who is clothed by the Court with the powers and duties of administrator: s. 24, sub-s. 2. Therefore under s. 1, sub-s. 1, this real estate vested in the widow, and by s. 2, sub-s. 2, all her powers over personal estate applied to it; she could convey the legal estate to the purchaser, and he took it bona fide for good

(1) 27 Ch. D. 220.
(2) [1905] 1 Ch. 613.
(3) (1822) 5 B. & Al. 744.
(4) (1804) 2 Sch. & Lef. 231, 237.
(5) (1880) 16 Ch. D. 49.
(6) (1690) Carth. 153.
(7) (1731) 2 P. Wms. 576.
(8) (1829) 2 Hagg. Eccl. 555.
(9) [1893] P. 21.
(10) (1862) 2 Sw. & Tr. 448.

consideration and without notice of any claim. The executor was not the personal representative till the will was found and proved, and the Act assumes that there is a personal representative during the whole time.

The effect of the Court of Probate Act, 1857, should be taken into consideration. By s. 3 the testamentary jurisdiction of the Ecclesiastical Courts was abolished, and by s. 4 it was to be exercised by the Court of Probate. Those powers are not cut down by s. 23. Administration pendente lite is provided for by s. 70. Where a person dies without appointing an executor an administrator may be appointed: s. 73. After grant of administration nobody can act as executor till the grant is revoked: s. 75. Payments under revoked administrations are valid: s. 77; and persons who make payments under probates are protected by s. 78.

By s. 37 of the Stamp Act, 1815 (55 Geo. 3, c. 184), penalties are imposed on persons who act as administrators without authority, so the widow in this case had to apply for letters of administration: Tristram and Coote's Probate Practice, 14th ed. p. 98. She also entered into the common form bond providing (inter alia) for delivery up of the letters of administration if a will should appear and be exhibited by the executors: Williams on Executors, 10th ed. p. 420; Tristram and Coote's Probate Practice, 14th ed. p. 912. It is clear from this common form bond, which dates from 1671, that the possibility of the existence of a will appointing executors has always been contemplated by the Court which grants administration, and it is inconceivable that the grant can become void ab initio if the contingency occurs.

The position of the purchaser must be considered. He found the property offered for sale by the administratrix appointed by a Court of competent authority, and he took every possible precaution. If he had refused to complete because there might be a will in existence, he would have been told that the Court would not contemplate such a possibility whilst the administration continued: Court of Probate Act, 1857, s. 75. It is suggested that the sale was not made for payment of debts or duties. This does not concern the purchaser, who had no right to inquire. There were, however, in fact, liabilities which justified the sale. As against the purchaser the order granting administration could

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not be upset: Conveyancing Act, 1881, s. 70. The purchaser was bound to assume that the grant of administration was valid and that the sale was made in due course of administration: *Oceanic Steam Navigation Co.* v. *Sutherberry.*(1) In *Solomon* v. *Attenborough* (2) the vendor did not purport to act as executor.

In this case every search for a will was made and failed and some one had to take out a grant. Under the old practice there could have been a mandamus to compel the Ecclesiastical Courts to make a grant to some one: *Anon.*(3) The difficulty was caused by the testator himself, and the same principle ought to apply as in a case where a testator appoints as his executors the executors of a living person.

Under 31 Edw. 3, c. 11, the Ordinary had to depute to the administrator the deceased's goods; that statute was never repealed and was in force when the Court of Probate Act, 1857, was passed. Administration during the absence of the executor, or the nonage of an infant executor, or the absence of one entitled to administration might have been granted by the Ordinary: Bacon's Abridgment, Executors and Administrators (G.); *Slater* v. *May* (4); Gibson's Codex Juris Ecclesiastici Anglicani (1713), vol. i. p. 573.

Under s. 73 of the Court of Probate Act, 1857, a grant may be made to an administrator where there is no executor "willing and competent" to take probate; that covers this case, and whether the earlier statutory provisions fall within s. 73 or not they equally help the appellant.

Having regard to the provisions of s. 75 of the Court of Probate Act, 1857, there could not exist subsequently to that Act the same state of things that occurred in *Graysbrook* v. *Fox* (5), where an administrator and an executor were both purporting to act simultaneously. The grant of administration is a judicial act which must be acted upon until it is either recalled or revoked. Under ss. 77 and 78 of the Court of Probate Act, 1857, any bona fide dealing with an executor or administrator is valid, and those two sections cover all bona fide transactions with an

(1) (1880) 16 Ch. D. 236.
(2) [1912] 1 Ch. 451, 455; [1913] A. C. 76.
(3) (1723) 1 Str. 552.
(4) (1704) 2 Ld. Raym. 1071.
(5) 1 Plowd. 275.

executor or administrator, and a purchaser taking a conveyance will be indemnified.

The grant is not void ab initio: *Boxall* v. *Boxall* (1); *Craster* v. *Thomas*. (2) The latter case involved a discussion on the Indian Succession Act, 1865, ss. 260 and 262 of which correspond to ss. 75 and 77 of the Court of Probate Act, 1857, and in *Debendra Nath Dutt* v. *Administrator-General of Bengal* (3) Lord Macnaghten was of opinion that the grant of the letters of administration in that case was not void ab initio. Those two last-named cases shew that although the person appointed administrator was an impostor yet his acts were good.

Payments to the executors of a forged will or to a wrong administrator have been held good: *Allen* v. *Dundas* (4); *Stephen* v. *Langley*. (5) *Prosser* v. *Wagner* (6) shews that the grant is not bad ab initio, and does away with the ground of the decision in *Graysbrook* v. *Fox* (7) and *Abram* v. *Cunningham*. (8) Both of those are very old cases turning on want of jurisdiction to appoint an administrator, and everything has changed since then. *Ellis* v. *Ellis* (9), followed by Astbury J., is not an authority which binds this Court.

The only way in which the executors can claim any title to this land is under Part I. of the Land Transfer Act, 1897, and we submit that in fact they have not got any title under that Act, because under s. 1, sub-s. 1, the land devolves to and becomes vested in the personal representative from time to time, who in this case was the administrator, and the legal estate will pass to any one dealing bona fide with the personal representative for the time being.

Further, this is an order of the Court within s. 70 of the Conveyancing Act, 1881. By the definition clause in that Act "Court" includes a Court of the Probate Division. "A 'judgment' is a decision obtained in an action, and every other decision is an order": per Lord Esher M.R. in *Onslow* v.

(1) 27 Ch. D. 220.
(2) [1909] 2 Ch. 348.
(3) (1908) L. R. 35 Ind. Ap. 109, 117.
(4) (1789) 3 T. R. 125.
(5) (1673) Finch, 40.
(6) (1856) 1 C. B. (N.S.) 289.
(7) 1 Plowd. 275.
(8) 2 Lev. 182.
(9) [1905] 1 Ch. 613.

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Inland Revenue Commissioners. (1) This grant therefore is an "order." The appellant is a purchaser for value under an order of the Court, and as such is protected by s. 70, and the grant cannot be invalidated on the ground of want of jurisdiction, and his title is good.

Jenkins, K.C., and *Arnold Herbert, K.C.*, for the respondents. The legal estate in fee simple did not pass by the conveyance to the appellant because by virtue of the Land Transfer Act, s. 1, sub-s. 1, it devolved to and became vested in the executors at the moment of the testator's death. Before that Act this point would not have arisen, because the co-heiresses could have given a good title; but under that Act the question arises whether the legal estate vested in the named executors or whether it passed to the widow to whom the grant of administration was made by virtue of the act of the Court of Probate. That Court cannot take property away from one person and vest it in another. The effect of the will was to vest the property in the named executors as from the date of the death unless they ultimately dissented, and nothing has occurred which displaces their title. The executor derives his title from the will and not from the probate, which is only evidence of his title. An executor can even bring an action before probate. When the testator died, the legal estate in fee simple did not pass to his administratrix because she did not exist; it went immediately to the named executors. They were the only persons who answered the description contained in the Land Transfer Act, and, subject to administration, they held the real estate as trustees for the persons by law beneficially entitled thereto by virtue of s. 2, sub-s. 1, of the Act.

[COZENS-HARDY M.R. What do you say takes place in a case where the executor is an infant and there is a grant durante minore ætate?]

The administrator in that event is in the position of an attorney; he is deputed to act during the infancy of the executor.

It is essential for the appellant to shew that he has the legal estate, otherwise he must fail. He cannot rely on the fact that

(1) (1890) 25 Q. B. D. 465, 466.

the administratrix was in fact one of the joint holders, because one of several named executors could not at that time have made a good title.

Under the law previous to the Land Transfer Act the administratrix could not have effectually conveyed a chattel real, for inasmuch as the will appointed executors in whom the property vested on the testator's death the grant of administration and everything done thereunder was void ab initio: *Graysbrook* v. *Fox* (1); *Abram* v. *Cunningham* (2); *Boxall* v. *Boxall* (3); *Ellis* v. *Ellis* (4); the only exception being where the visible administrator is deemed to do by subrogation acts which the executor must have done. The ground of the decisions in those cases was that the title to the property which was the subject of the action was vested in the executors named in the will. The real test is the right of property. Williams on Executors, 10th ed. p. 461, contains the following passage with reference to the effect which the revocation of probate or letters of administration has on the intermediate acts of the former executor or administrator: "The first important distinction on this subject is, between grants which are void, and such as are merely voidable. If the grant be of the former description, the mesne acts of the executor or administrator, done between the grant and its revocation, except in so far as they are protected by the above-mentioned statutes, shall be of no validity." *Graysbrook* v. *Fox* (1) is cited in support of that, and in every case in this country since *Graysbrook* v. *Fox* (1) a similar grant has been held void.

The Court of Probate Act, 1857, has not enacted anything to make the old cases obsolete, and ss. 77 and 78 have put the law on the old lines of *Graysbrook* v. *Fox*. (1)

There are no doubt many special instances in which notwithstanding the existence of an executor the Court of Probate may grant administration.

(1.) It may grant administration durante minore ætate of an executor.

The administrator in such a case is not displacing any one, he

(1) 1 Plowd. 275.
(2) 2 Lev. 182.
(3) 27 Ch. D. 220.
(4) [1905] 1 Ch. 613.

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is only temporarily in existence, and while he is there the property is not in any one else.

In re Cope (1) was not the case of an executor at all. An administrator durante minore ætate has only a limited and special property in the estate of the deceased, and has no general power of disposition: *Prince's Case.* (2)

(2.) The next case of a special grant is the grant pendente lite. That is governed by the Court of Probate Act, 1857, s. 70.

[COZENS-HARDY M.R. referred to Burn's Ecclesiastical Law, 9th ed. vol. iv. p. 381.]

The Court of Probate Act embodied in a code certain jurisdictions which the Court was at that time in the habit of exercising. There is nothing in the code to displace the law established by *Graysbrook* v. *Fox* (3) and *Abram* v. *Cunningham.* (4)

[PHILLIMORE L.J. referred to *Maskeline* v. *Harrison* (5), where Sir G. Lee founded himself upon *Walker* v. *Woollaston* (6), and to *Piggot's Case.* (7)]

It is admitted that in this case the Court assumed to itself the power to clothe the temporary administrator with rights of property sufficient to enable him to carry out the administration for the benefit of the infant. That was recognized by the Act 38 Geo. 3, c. 87. The Ecclesiastical Courts assumed jurisdiction to grant administration where there was an infant executor. They could only do that by putting the administrator in a position to sell the property for the payment of debts. That was recognized by the Court of Probate Act.

[BUCKLEY L.J. The property, if it passed, must have passed for all purposes.]

It must be conceded that in that particular case the property passed. The power must have come from an extension of what is called the equity of the statutes: see *Walker* v. *Woollaston.* (8)

(3.) The next case of special grant is the grant durante absentia. On that I desire to refer to *Webb* v. *Kirby* (9), where

(1) 16 Ch. D. 49.
(2) (1599) 5 Rep. 29b.
(3) 1 Plowd. 275.
(4) 2 Lev. 182.
(5) (1756) 2 Lee, 258.
(6) 2 P. Wms. 576.
(7) (1598) 5 Rep. 29a.
(8) 2 P. Wms. 589.
(9) (1856) 7 D. M. & G. 376, 381.

the Court declined to compel a purchaser to accept a title depending upon a sale by the administrator de bonis non of the testator durante absentia of his next of kin.

[PHILLIMORE L.J. referred to *In the Goods of Earl.* (1)]

The Court cannot take property which is vested in one and give it to another unless it has some statutory jurisdiction to do so.

This case is not within any of the above-mentioned special instances.

Sect. 73 of the Court of Probate Act, 1857, gives the Court power to appoint an administrator where there is no executor willing and competent to take probate. It cannot be said that a person is unwilling to take probate when he does not know that he has been appointed executor. The section does not apply to such a case as this, where a person was thought to have died intestate, but had in fact made a will and appointed executors.

[PHILLIMORE L.J. referred to *Harris and Wiggins* v. *Milburn.* (2)]

In the Goods of Metcalfe (3) and *In the Goods of Campbell* (4) were cases in which administration limited till the will be found was granted. The law is summed up in Williams on Executors, 10th ed. pp. 408 et seq. *Allen* v. *Dundas* (5) illustrates the class of cases where payments by debtors under compulsion to a de facto executor are protected. The pre-existing law was recognized by s. 77 of the Court of Probate Act, 1857. But that does not affect the respondents' case. It is not contended that the grant was not good, but the question is what was the effect of it. In so far as it purported to pass property it was a nullity. The Court had no jurisdiction to pass the property because the property was not in the administrator but in some one else. No property vested in the administrator. Here the purchaser was under no compulsion to buy. The Court of Probate Act expressly provides for the protection of debtors who are under compulsion to pay, but not for that of purchasers who are under no such compulsion: *Prosser* v. *Wagner.* (6)

(1) (1867) L. R. 1 P. & M. 450.
(2) (1828) 2 Hagg. Eccl. 62.
(3) (1822) 1 Add. 343.
(4) 2 Hagg. Eccl. 555.
(5) 3 T. R. 125.
(6) 1 C. B. (N.S.) 289.

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[COZENS-HARDY M.R. Having regard to the form of the administration bond some property must be vested in the administrator.

PHILLIMORE L.J. referred to Williams on Executors, 10th ed. p. 421.]

This case is covered by *Graysbrook* v. *Fox* (1), *Abram* v. *Cunningham* (2), *Boxall* v. *Boxall* (3), *Ellis* v. *Ellis* (4), and *Craster* v. *Thomas.* (5) Further, it is submitted that under the Land Transfer Act, 1897, ss. 1, 2, 24, the testator's real estate at his death vested like chattels real in all his executors independently of their proving or acting: *In re Pawley and London and Provincial Bank.* (6) The decision of North J. in *John* v. *John* (7) on this point cannot be supported.

Here the property was vested in the executors on express trust for one for life with remainder over. Nothing has happened to divest the property. The question is whether the Court by the grant of administration in ignorance of the facts has destroyed the respondents' estate in the property. The submission is that there was no jurisdiction to do so. The expression used in the statute is "personal representative," not "legal personal representative." If that means an executor only after probate, then our contention is wrong.

The Conveyancing Act, 1881, does not apply to a case like this. A grant of administration is not a judicial act within s. 70: *Jones* v. *Barnett.* (8) In this case the Court has acted upon a mistaken assumption of fact. [*Hensloe's Case* (9) was also referred to.]

Micklem, K.C., in reply. In the Court below it was contended that the grant of administration and everything done under it was void ab initio. It is now admitted that the grant may be good for some purposes, but it is said that no property passes. Such an argument is untenable.

The question is who are the "personal representatives from

(1) 1 Plowd. 275.
(2) 2 Lev. 182.
(3) 27 Ch. D. 220.
(4) [1905] 1 Ch. 613.
(5) [1909] 2 Ch. 348.
(6) [1900] 1 Ch. 58.
(7) [1898] 2 Ch. 573.
(8) [1900] 1 Ch. 370.
(9) (1600) 9 Rep. 36b, 38b.

time to time" within the meaning of s. 1 of the Land Transfer Act, 1897. The words certainly include the legal personal representative who by judicial act has been clothed with the character of administrator. A person who is named as executor in the will is not necessarily the personal representative at all.

Cur. adv. vult.

March 14. COZENS-HARDY M.R. This appeal raises an important question as to the operation and effect of letters of administration granted by the Probate Division of the High Court, on the assumption that there was no will, to the widow of the deceased, where afterwards a will was discovered which has been admitted to probate, the letters of administration being recalled. It has been held by Astbury J. that the executors' title relates back to the death, and that the grant of letters of administration was, and all acts done by the administratrix were, void and of no effect. The question arises upon a conveyance by the administratrix in 1902 of a freehold estate purchased by Sir John Shelley. The will was discovered in November, 1911, and proved in February, 1912. The executors have recovered the property in this action. It is not disputed that there was absolute good faith in all parties concerned. It will be convenient, in the first place, to consider the position if the property sold had been held for a term of years, and, in the second place, to consider what, if any, difference is made by reason of the property being held in fee simple. The learned judge held himself bound by *Graysbrook* v. *Fox*, decided in the Common Bench, in the 7th Elizabeth, and reported in 1 Plowden 275, and *Abram* v. *Cunningham*, decided in the King's Bench in the 28th Charles II., which authorities were recently followed by Warrington J. in *Ellis* v. *Ellis*. (1) It may well be that the learned judge was justified, having regard to these authorities, in deciding as he did. Having had the advantage of very able arguments from counsel and having carefully considered all the authorities which have been called to our attention, I have arrived at the conclusion that the judgment under appeal ought to be discharged.

(1) [1905] 1 Ch. 613.

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I have read the judgment Phillimore L.J. is about to deliver, in which he has fully considered the history of the law and the old authorities. I agree with that judgment. But, having regard to the importance of the case, I think I ought to state generally the line of reasoning by which I have reached the conclusion that the appeal should be allowed.

The earliest authority is in the Year Book 7 Edw. 4, where Littleton, with the concurrence of two other judges, said that where an executor has been appointed unknown to himself he may, when he has become aware, wholly take upon himself the powers of administration "and, Sir, the Ordinary may well grant administration in the mean time as he did here, but by the proving of the will the powers of the administrator are now determined." This authority has been recognized in Fitzherbert's Abridgment, 1577, in Brooke's Abridgment, 1587, in Rolle's Abridgment, in Viner's Abridgment, and, so far as I am aware, in every text-book of authority, including Williams on Executors, 10th ed. p. 199. It was referred to, and not disputed, in *Graysbrook* v. *Fox*. (1) The decision of the majority of the judges in that case is illogical because they admitted that a sale by the administrator for the purpose of paying funeral expenses and debts should not be avoided but should remain indefeasible, a principle which it is impossible to reconcile with the theory that a grant of administration was void ab initio. Side by side with *Graysbrook* v. *Fox* (1) there are a series of authorities establishing that the Ecclesiastical Courts could grant and did grant limited administration even where there was an executor, for example (*a*) where an executor was a minor (*Piggot's Case* (2)), (*b*) where there was litigation and it was doubtful whether there was a will at all or which of two wills was valid, and (*c*) where an executor was out of the country. If there were any serious doubt as to the law before the Statute of Distributions (22 & 23 Car. 2, c. 10), I think the form of bond provided by the statute in cases of administration goes far to remove it. It contemplates the possibility of there being a will which may subsequently be proved. It imposes an obligation upon the administrator to pay debts and to distribute the surplus. All this could not be done

(1) 1 Plowd. 275. (2) 5 Rep. 29a.

unless the administrator had, by virtue of the grant, the personal property vested in him. The bond under the Probate Act is substantially in the same form.

The contention which prevailed in the Court below leads to startling results. A debtor of the deceased man might pay the administrator and would get a good discharge. If sued by the administrator he would not be allowed to challenge the title of the administrator. A purchaser could not resist a decree for specific performance of a contract for sale by the administrator. In short, it seems to me that the person for the time being clothed by the Court of Probate with the character of legal personal representative is the legal personal representative, and enjoys all the powers of a legal personal representative, unless and until the grant of administration is revoked or has determined. If this view is not right no person could safely deal with, or accept, a title from an administrator, for it is impossible to prove that there may not be a will. The decision of Gorell Barnes J. in *In the Goods of Wright* (1) is a direct authority in favour of the view which I have taken. In that case administration was granted until the original will or an authentic copy should be brought into the registry for the very purpose of enabling the sale of leaseholds to be completed and limited to that purpose. In my opinion *Graysbrook* v. *Fox* (2), *Abram* v. *Cunningham* (3), and *Ellis* v. *Ellis* (4) must be regarded as no longer law.

It remains to consider the effect of the Land Transfer Act, 1897, s. 2. I think it confers upon the legal personal representative for the time being the same powers with reference to real estate as he would have as to personal estate, subject to some exceptions not material for the present purpose. If, as I hold, the administratrix could have sold and conveyed a leasehold, I think she could convey, as she did, the freehold property to Sir John Shelley. I prefer to base my decision on the general grounds above stated, and not upon any special provisions in the Court of Probate Act, 1857, although I think there is a good deal in that Act which assists the appellant.

There is, however, a separate point under s. 70 of the

(1) [1893] P. 21.
(2) 1 Plowd. 275.
(3) 2 Lev. 182.
(4) [1905] 1 Ch. 613.

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Conveyancing Act, 1881. It seems to me that the order granting administration to the widow was a judicial act, and even if that grant could be held void on the ground of want of jurisdiction the title of the purchaser would be protected under that section.

In my opinion the appeal succeeds and the action must be dismissed with costs here and below.

BUCKLEY L.J. On January 30, 1899, G. F. Hewson died seised. On June 13, 1899, letters of administration were granted to his widow. On October 13, 1902, she as administratrix conveyed the land to a bona fide purchaser for value without notice. On September 2, 1911, the widow died. On November 11, 1911, in going through her papers a holograph will of G. F. Hewson was found. It appointed the plaintiffs and two others to be executors. Until that time every one bona fide believed that he had died intestate. On February 9, 1912, the letters of administration were revoked and probate was granted to the plaintiffs. In this action, commenced on January 14, 1913, the plaintiffs have recovered in ejectment against the purchaser. We have to decide (standing as we do in a position in which we are more at liberty than was Astbury J. to review the law) whether this is right.

If it is right it is difficult to see how any one could ever accept a conveyance from a legal personal representative. The situation is not confined to the case of no will found or believed to exist, nor to that of lost will and letters of administration granted in any such case. If the deceased died leaving a will whereby he appointed executors and they proved and sold, the case would be the same if subsequently a later will came to light by which the former will was revoked. Further, if in any case a purchaser declined to complete and the legal personal representative de facto brought his action for specific performance and recovered judgment, the purchaser would nevertheless be liable to ejectment although in the specific performance action he could not have been heard to deny that the plaintiff was legal personal representative. If an administration action were brought in which an order was made for sale and a vesting order obtained,

the purchaser would have no title. *Jones* v. *Barnett* (1) would not apply to such a case. To take possession and administer without probate or administration within a limited time is a statutory offence visited with a penalty (55 Geo. 3, c. 184, s. 37), but at the same time acts done under letters of administration bona fide taken are according to the argument void. If such be the law it urgently requires to be set right by legislation. We have to consider whether it is the law.

An inquiry which it is convenient to make in the first instance is whether the purchaser under such circumstances has obtained the legal estate. If he has, and if, as is here the case, he is bona fide purchaser for value without notice, is there any ground to take it from him? If the legal estate was in the administratrix it has passed to the purchaser. Was it under s. 1 of the Land Transfer Act, 1897, in the administratrix? Upon G. F. Hewson's death leaving a will appointing executors, it is contended and I assume that the legal estate vested in the executors, although no one knew that there were such. This is so unless "executor" in s. 24, sub-s. 2, of the Land Transfer Act means "executor who has proved." It is not so defined in the Act of 1897. The definition is in contrast with that in s. 8, sub-s. 4, of the Conveyancing Act, 1911. For the present purpose I do not find it necessary to decide, but assume, that in the language of the Land Transfer Act an executor is before probate personal representative. But when on June 13, 1899, letters of administration were granted to the widow the legal estate, by virtue of the 1st section, vested in the administratrix if she thereupon became within the section the deceased's personal representative. Did she become such personal representative? The respondents contend that she did not. By their contention as ultimately evolved in the argument I understand them to mean not that the order of the Probate Division and the grant to her were for all purposes void ab initio, but that the effect of the order was that notwithstanding she became administratrix yet no property vested in her. Having regard to ss. 77 and 78 of the Court of Probate Act, 1857, they say that for the purposes of those sections the order was a good order. But they add that the order did not operate to

(1) [1900] 1 Ch. 370.

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pass the property because the property was, they say, in some one else, namely, the unknown executors. I find it difficult to understand an administrator who as regards ownership of the property to be administered is nobody but at the same time is a person owing the duties expressed in the bond, namely, well and truly to administer all the estate which by law devolves to and vests in the personal representative of the deceased, but having no property in that which he has to administer. However, the argument is that there was no jurisdiction in the Court of Probate to make such an order as would reach the property. I shall presently examine the cases to see whether this can be maintained.

There are many cases in which notwithstanding the existence of an executor the Court of Probate may grant administration, for instance durante minore ætate (*In re Cope* (1)); durante absentia (in which case 38 Geo. 3, c. 87, s. 7, would, I agree, confer such power as would exist in an administrator durante minore ætate); pendente lite even where the lis is touching an executorship (*Walker* v. *Woollaston* (2); Bacon's Abridgment, Executors (G)); until the will (which was in India) can be brought here for probate (*In the Goods of Metcalfe* (3)); or until the will be found (*In the Goods of Campbell* (4); *In the Goods of Wright* (5)); and may clothe the administrator with the office and cast upon him the duties of administrator. Sect. 73 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), includes amongst other events in which an administrator may be appointed the event of the executor being resident out of the United Kingdom. Such an administrator is and an administrator appointed for a limited time such as above mentioned is, I think, personal representative within s. 1 of the Land Transfer Act. If there be an executor and he has acted (so that he cannot subsequently renounce), but the Court does not know it and grants letters of administration to another, the administration may be revoked, but until revoked is valid according to *Doyle* v. *Blake*. (6) Lord Redesdale there observed that "some of the old cases could

(1) 16 Ch. D. 49.
(2) 2 P. Wms. 576, 589.
(3) 1 Add. 343.
(4) 2 Hagg. Eccl. 555.
(5) [1893] P. 21.
(6) 2 Sch. & Lef. 237.

scarcely be supported on principle, they were decided whilst a great jealousy of the Ecclesiastical Court prevailed," and added that "the administration was void only as a protection to the executor but in no other sense."

In *Allen* v. *Dundas* (1) a receipt given by the executor of a forged will which had been admitted to probate was held to be a good discharge although the probate was afterwards declared null and administration granted to the next of kin. Ashhurst J. said: "Every person is bound to pay deference to a judicial act of a Court having competent jurisdiction," and Buller J. said: "Here there was an executor de facto who had obtained a probate and the defendant neither knew nor could tell whether he was rightful executor or not further than he was informed by the probate which he could not dispute." And again: "Evidence that another and not the plaintiff was executor or that the testator was non compos mentis or that the will was forged could not be admitted, for that would be to falsify the proceedings of the Ordinary in cases of which he was judge."

The appellant says, and I think with justice, that the order of the Court of Probate is within s. 70 of the Conveyancing Act, 1881, an order which as against a purchaser is not to be invalidated on the ground of want of jurisdiction. So that even if (as I think is not the case) the Probate Court had not jurisdiction to grant administration, the purchaser is entitled to say that as against him no one can say the order was invalid.

The decision which is said principally to create difficulty is the case of *Graysbrook* v. *Fox*. (2) The dates were: Death on December 27, administration granted to the son on January 15, sale by the administrator at some date before January 27, probate of the will by the son-in-law who was executor on January 27, goods delivered to Fox the purchaser on February 1. In the action the executor recovered from Fox, who had purchased from the administrator. Walsh J. and Dyer C.J. held for the plaintiff, Weston J. for the defendant. Dyer C.J. says that "the executor takes his commencement by a temporal act, namely, by the making of the will of the testator, which is a temporal act, but takes its perfection by a spiritual act, namely, by probate in the

(1) 3 T. R. 125, 129, 131. (2) 1 Plowd. 275.

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spiritual Court, and the executor's authority is over a thing temporal. But the Ordinary or administrator have no authority or interest unless the deceased die intestate" (meaning seemingly die without appointing an executor) (p. 280). Again at p. 281: "At the death the law vests the property in the executor and consequently never vests it in the Ordinary and therefore never through him in the administrator." Dyer C.J., however, cites Littleton in 7 Edw. 4, 12b: "presently by the probate the power of the administrator is *determined*." The passage in the Year Book is as follows: "A man may make me his executor unknown to myself etc. and then when I have become aware of it I may well take upon myself the power of administration disposition etc. and, Sir, the Ordinary may well grant administration in the meantime as he did here, but by the proving of the will the powers of the administrator are determined unless the executors have at one time refused before the Ordinary, then perchance the law may will otherwise." In Fitzherbert's Abridgment (1577), Administrators (folio 13), and Brooke's Abridgment (1586), Executors, the passage is found in similar terms. If "determined" here means, as I think it does, "brought to an end" and not "declared to be void," the passage is no authority for saying, as Dyer C.J. said, that the property never has vested in the administrator. That is for the purposes of the Land Transfer Act the material question. Further, in 1 Rolle's Abridgment, p. 907, and in 11 Viner's Abridgment, p. 66, the case is referred to as authority for the proposition that "If a man makes an executor, but it is not known, or concealed, the Ordinary may grant administration, and this shall be good till the other prove the will." In this state of things it seems to me that *Graysbrook* v. *Fox* (1) is not an authority that such an order for administration creates no title in the administrator, and having regard to the passage in Plowden at p. 282 it seems impossible that it can be so. That passage affirms that a sale by the administrator to raise money for funeral expenses or debts is good. How can a sale of goods in which the vendor has no property be good? Either the property is or it is not in the administrator. If, as *Graysbrook* v. *Fox* (1) affirms, the administrator

(1) 1 Plowd. 275.

has the property for some purposes, it must be that the property passes to him although he may be restricted in his power over it, and when probate is granted to the executor that power "is determined." The result of the decision I think is at most that the property does vest in the administrator, but with restrictions upon his power of dealing with it. This view is borne out by such cases as *Prince's Case* (1), where it was held that the administrator durante minore ætate could sell, but not unless it be of necessity for payment of debts or on the ground of bona peritura, and is I think consistent with all the cases. *Graysbrook* v. *Fox* (2) looks very much like a case in which there was a race between son and son-in-law and the title under the executor was preferred to that derived under the administrator. Upon the facts moreover it appears that the goods only "came to" Fox on February 1 after probate granted. In *Abram* v. *Cunningham* (3) counsel conceded that *Graysbrook* v. *Fox* (2) had decided more than I think it did decide, and the Court held that administration taken when there was an executor "was void at first and was not made good by the renunciation of the executor." The case is treated, however, as one of concealed will, not of unknown will.

Woolley v. *Clark* (4) was again a case of concealed will. The defendants were two, namely, the executor of an earlier will and the auctioneer who sold by his direction, and they had notice of the later will previously to the sale of the goods. The purchaser was no party. Best J. in giving judgment says that in the case of a judgment irregularly obtained "the sheriff is justified," and applies that illustration by saying that the party who obtained the probate was not justified in selling, "but a creditor who paid a debt while the letters of administration were unrepealed would be protected."

In *Boxall* v. *Boxall* (5) the will contained no appointment of executors, so that the question as between executor de facto and administrator suppressing a will did not arise.

These are the cases relied upon as supporting the proposition

(1) 5 Rep. 29b.
(2) 1 Plowd. 275.
(3) 2 Lev. 182; 2 Mod. 146; Freem. K. B. 445.
(4) 5 B. & Al. 744.
(5) 27 Ch. D. 220.

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that a disposition by the administrator when there is in fact an executor is void. To these is to be added *Ellis* v. *Ellis* (1), which Astbury J. in fact followed in the judgment now under appeal.

I do not think that *Graysbrook* v. *Fox* (2) supports the above proposition, and if *Abram* v. *Cunningham* (3) supports it I think it is wrong. The true view of these cases is I think that the property does pass, that the authority of the administrator is not a void but a determinable authority, and that for certain purposes at any rate he has a power of disposition over the property to be administered. In *Packman's Case* (4) and *Blackborough* v. *Davis* (5) it was decided that letters of administration granted contrary to the statute (e.g., not to the nearest of kin) when repealed were not void, but all dispositions of goods pending the administration were good. From this it seems to follow that the order of the Ecclesiastical Court is not void ab initio, and that the property does pass to the administrator for the time being.

There is clear authority that payments to as distinguished from dispositions by what is called the "visible administratrix" (*Stephens* v. *Langley* (6)), as, e.g., the executor of a forged will (*Allen* v. *Dundas* (7)) or the administrator when there existed a will (*Prosser* v. *Wagner* (8)), are valid.

I arrive, therefore, at the conclusion that where an administrator has been appointed by an order of the Probate Court the visible administrator, as he is called in *Stephens* v. *Langley* (6), is a person who is within s. 1 of the Land Transfer Act a "personal representative." From this it results that the real estate which was vested in the person of whom he is personal representative vests in him by virtue of the words "become vested in his personal representatives or representative from time to time," and that a purchaser for value without notice from him conveying as administrator obtains a good title.

It follows that this appeal must be allowed.

(1) [1905] 1 Ch. 613.
(2) 1 Plowd. 275.
(3) 2 Lev. 182; 2 Mod. 146; Freem. K. B. 445.
(4) (1595) 6 Rep. 18b.
(5) (1701) 1 P. Wms. 41.
(6) Finch, 40.
(7) 3 T. R. 125.
(8) 1 C. B. (N.S.) 289.

PHILLIMORE L.J. On January 30, 1899, one George Francis Hewson died leaving a widow, no children, three nieces who were his co-heiresses at law, and the same three with three other nephews and nieces his next of kin. He appears to have stated to his wife shortly before his death that he had made a will and left everything to her. But after diligent search no will could be found. The widow therefore took out general letters of administration, collected and divided the personal estate, and ultimately on October 13, 1902, sold and conveyed his real estate, being a farm in Hants, to the defendant Sir John Shelley for 3500*l*. A part of the proceeds was retained to secure the widow's dower, and the rest was divided between the co-heiresses. The sale was apparently made with the consent of the co-heiresses but in exercise of the legal title of the administratrix. It does not distinctly appear whether it would or would not have been necessary for payment of debts.

On September 2, 1911, the widow died. Her executor, looking over and for papers, discovered at the back of a bureau a holograph will of George Francis Hewson. This discovery was made on November 11, 1911. The will had been made on April 24, 1894. By it the testator appointed four executors, one being his wife, and devised his estate to his wife for life with remainder to a relative who was not heir-at-law, nor one of the next of kin. On February 9, 1912, the two surviving executors, one being the devisee of this estate, obtained recall of the letters of administration and probate of the will; and on January 14, 1913, they brought this action against the purchaser, Sir John Shelley, his mortgagees, and the tenant in occupation to recover the estate.

Astbury J. has decided with reluctance and in obedience to authorities, which were probably binding upon him as a judge of first instance, in favour of the plaintiffs, and it is from this judgment that the present appeal is brought.

The principle upon which the learned judge decided was that this administration, there being in existence though unknown a will appointing an executor, was void—not voidable but void.

Before us the counsel for the respondents have preferred to support the judgment on the ground that the administratrix in the circumstances acquired no title to any property, at any rate

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not to the real property of Captain Hewson, and having no title could pass none on. The case has been most ably and learnedly and, I might add, courageously argued by counsel on both sides; and it necessitates a research into first principles.

I propose, in the first instance, to deal with the matter apart from the effect of the Land Transfer Act, 1897, and to consider the case as if we were dealing with a conveyance of leaseholds, chattels real.

It is said for the respondents that the property of a deceased person vests in the executor immediately upon the death and by the mere effect of the will. In some senses this is true. It is true that an executor can properly act at once, that he can collect his testator's goods, receive and give discharge for debts due, and alien the goods including chattels real in due course of administration, subject always to the condition that he will some time or another satisfy the Court that has jurisdiction over the subject-matter that there is a will and that he is the executor. But till he has proved it or till it has been proved to the Court, till it has become probatum, his title is not certain, and in that way is not complete.

The Statute of Westminster the Second, c. 19 (A.D. 1285), recognizes that the personal property of a person dying intestate passes to the Ordinary, making provision that in future the Ordinary shall be responsible for the deceased's debts so far as the assets extend. Subject to this provision the Ordinary remained as before entitled to dispend the goods of the deceased to such pious uses as he thought fit. Before and after this Act an administrator was the mere bailiff or deputy of the Ordinary whom he selected at his will and pleasure, who had no independent right and could not bring an action any more than a sequestrator appointed by the Ordinary: *Harding* v. *Hall* (1); Phillimore on Ecclesiastical Law, 2nd ed. p. 375.

The Act 31 Edw. 3, c. 11 (A.D. 1357), restricted the power of selection and gave the administrator, called in the Act the deputy, power to sue as an executor could: see *Hensloe's Case*. (2) The Act 21 Hen. 8, c. 5 (A.D. 1529), further limited the Ordinary in his choice of an administrator.

(1) (1842) 10 M. & W. 42.

(2) 9 Rep. 40a.

At some stage in the history of our law (when it is not necessary to determine) the Ordinary became bound to allow a pars rationabilis to the widow and next of kin.

But it was not till the Statute of Distributions (22 & 23 Car. 2, c. 10, A.D. 1670) that the Ordinary became bound to distribute "the surplusage" (those are the words of the statute) to the widow and next of kin in shares and in an order of succession statutably defined. By the same Act the Ordinary was directed to take bond with sureties in a form provided by it from the administrator to ensure the latter's due administration. The condition of the bond is important for another part of the argument. I rather think that though the word "administration" is used in the Act of Henry VIII. the Act of Charles II. is the first which uses the word "administrator."

From the date of the Act of Charles II. the Ordinary ceases to have any interest in the administration of the estate of an intestate. He has no discretion as to the distribution of the "surplusage." He becomes a mere judicial officer, declaring the intestacy, determining it inter partes if there is a dispute, appointing as administrator the person who is entitled by law to be appointed, determining in what was called "an interest" suit who is the person entitled, if there is a dispute, and taking his established fees of office or Court.

As soon as the temporal Courts had come to appreciate this position their jealousy of the Ordinary ceased, as is stated by Lord Redesdale in *Doyle* v. *Blake* (1804).(1) It is perhaps unfortunate that *Abram* v. *Cunningham* (2) should have come up for decision a year or two before the Act of Charles II.

I will deal with the authorities later on, but before beginning with them in detail, I would observe that in some of them it is put as if the jurisdiction of the Ordinary was conferred upon him by the statute 31 Edw. 3, c. 11, and was restricted by that statute to cases of intestacy. The jurisdiction was not conferred by that statute or even by the earlier one of Westminster the Second. The jurisdiction, or, more properly, the vesting of the estate of an intestate with power to distribute it subject to certain provisions as he thought proper, is recognized by the

(1) 2 Sch. & Lef. 231. (2) 2 Lev. 182.

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Statute of Westminster the Second as already existing. The statute of Edward III. requires the Ordinary where the estate has become vested in him to pass it on to an administrator, whereas before the administrator was only his deputy created for his own ease and convenience. Still, however, if a special construction be put upon the word "intestate," there is no objection to saying that it is only in case of an intestacy that the estate vested in the Ordinary, and could be committed or passed on by him to an administrator. That some special meaning must be put upon the word "intestate" is obvious. No one has ever denied the power of the Ordinary to grant administrations cum testamento annexo or de bonis non; and it will appear as I proceed that though administrations lite pendente, durante minore ætate, and durante absentia have been disputed, ultimately the power of the Ordinary to grant them was established, and when I say this I do not mean established by 38 Geo. 3, c. 87, or by the Court of Probate Act (20 & 21 Vict. c. 77), but by decisions.

The question, therefore, narrows itself down to this, if we look at it from the point of view of jurisdiction, whether a deceased who leaves no known will, or at any rate no known executor, may be treated as intestate. If he may be so treated, in other words, if a general administration may lawfully be granted and not be void, though it appear afterwards that there is a will with a living executor who consents to act, it will be strange if the acts of that administrator validly appointed must be deemed invalid, and if though authorized to administer the estate of the deceased he has no such title to it as to enable him to dispose of it in due course of administration.

Now I come to the cases.

I have read and re-read the case of *Graysbrook* v. *Fox* (1), and I think there is no explaining of it away. It was there held on a clean case raised by demurrer that, as against an executor who subsequently obtained probate, the title of a purchaser to goods sold to him by a previous administrator was worthless. And in the case of *Abram* v. *Cunningham* (2) a title given by an administrator de bonis non was held worthless as against the claim of an administrator to the executor. It is true that in both cases

(1) 1 Plowd. 275. (2) 2 Lev. 182.

the Court may have well thought that the merits were with the successful party and that this might possibly account for neither case going further on appeal. In the first, the defendant could only allege that he had bought the goods from the administrator a month after death and twelve days after the letters of administration. And in the second case the sale was made after the administrator had been cited to bring in his letters so that they might be revoked, and only two days before they were revoked. But as I have said each case purports to be a clean decision on the point of law. The criticism on the judgment of the majority of the Court in the first case is that they had not the courage of their opinions. They start by saying that the administration was merely void, and yet one of them, Walsh J., with the concurrence of Dyer C.J., and with the concurrence of the minority judge, Weston J., said (p. 282) if the defendant had pleaded that the goods had been sold to him to raise money in discharge of the funeral or of the debts of the deceased, the sale had been good and indefeasible. On what principle it is difficult to see. If the estate of the deceased had been vested in the Ordinary and had been passed by him to the administrator because there was an intestacy in the sense that there was no will, surely the administrator could make a good title, and it would not be for the purchaser to inquire the object of the sale; but if the estate vested by law in the executor immediately on the death without probate and probate is only necessary to perfect the evidence of title, one does not see how the administrator got title or could pass a title for any purpose. Another criticism is that Lord Dyer seems in part to found himself on a case in the Year Book 7 Edw. 4 which is in apparent contradiction to the decision which he gives.

Abram v. *Cunningham* (1) is a more extreme case because there the title was in fact tried between two administrators. However, those cases have found their way into the text-books, and have been recognized as law in comparatively recent times. Kay J. distinguished the second in *Boxall* v. *Boxall* (2), where there was the fortunate accident that the will appointed no executor. Neville J. escaped from it by proceeding on the

(1) 2 Lev. 182. (2) 27 Ch. D. 220.

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Indian Succession Act, 1865, in *Craster* v. *Thomas*. (1) *Woolley* v. *Clark* (2) is, I think, distinguishable. It was not an action against the purchaser from an administrator, but against the administrator himself, who under an administration cum testamento annexo sold property at his peril at a time when he had notice of a later will which ultimately received probate. Warrington J., moreover, in *Ellis* v. *Ellis* (3) purported to follow the two old cases, and added his sanction to their authority.

On the other hand, there has been a current of opinion in an opposite sense. In the Year Book 7 Edw. 4, 12 and 13, Littleton J., with whom Newton J. and Danby J. agreed, held that the Ordinary may well grant administration in the meantime, that is, before the will is known, or it may be even before the executor has come forward and sought for probate, but by the probate of the testament the power of the administrator is determined; and the decision appears to have been to that effect. This means that the administrator gets and can give a good title subject to its being determined by the production of a will with an executor and perhaps also probate. Whether it be necessary, as is the modern practice, first to recall the letters of administration, or whether the power of the administrator ceases ipso facto upon his knowledge that there is a will, is a point immaterial for the present discussion.

The effect of *Graysbrook* v. *Fox* (4) no doubt is given in Rolle's Abridgment at p. 919, but the doctrine of the Year Book case already cited appears at p. 907. I have mentioned the bond required by the Statute of Distributions. That contemplates that administration may be committed though there be a will, and only requires of the administrator that he should bring in his letters upon knowledge of it. Again the Courts have held that such an administrator or an executor under a forged will can give a good discharge to the deceased's debtors: see *Allen* v. *Dundas* (5), *Woolley* v. *Clark* (2), and *Prosser* v. *Wagner*. (6) And then there are the peculiar cases of administrations lite

(1) [1909] 2 Ch. 348.
(2) 5 B. & Al. 744.
(3) [1905] 1 Ch. 613.
(4) 1 Plowd. 275.
(5) 3 T. R. 125.
(6) 1 C. B. (N.S.) 289.

pendente, durante minore ætate, durante absentia, durante animi aut corporis vitio.

As to administration lite pendente, consistently with the view that the Ordinary has no jurisdiction, or, if it be put the other way, no property to vest, where there is an executor, a Court of common law held in the case of *Frederick* v. *Hook* (1) that such an administration passed no title. But in *Walker* v. *Woollaston* (2) the contrary was decided by the Court of Common Pleas after an able and suggestive argument by Mr. Peere Williams, and has since obtained as law. Sir George Lee, Judge of the Prerogative Court, remarks somewhat drily in *Maskeline* v. *Harrison* (3) on the change of view of the Common Law Courts in this matter. Lord Redesdale in *Doyle* v. *Blake* (4) has some pertinent observations to the effect that some of the old cases could scarcely be supported on principle. He appears to have held that an administration was not a mere nullity but only repealable.

As to administration durante minore ætate, no doubt it rested after a time upon the express words of the statute 38 Geo. 3, c. 87. But it had been established before in *Piggot's Case* (5), with which the next case—*Prince's Case* (6)—when properly considered agrees. (See also *Sir Moyle Finch's Case* (7).)

As to administration durante absentia, the case of *Webb* v. *Kirby* (8) was relied upon for the plaintiffs, because there the Court held that a title derived from an administrator durante absentia was not certain enough to be forced upon a purchaser; but the reason given is not that such an administrator had no estate, but that his estate only lasts during the absence and life of the executor, and there could be no constat that the executor was still alive.

As to administration durante animi aut corporis vitio, no direct authority as to its validity or otherwise has been cited; but it is classed with the other special administrations in

(1) 1 Carth. 153.
(2) 2 P. Wms. 576.
(3) 2 Lee, 258.
(4) 2 Sch. & Lef. 231.
(5) 5 Rep. 29a.
(6) Ibid. 29b.
(7) (1606) 6 Rep. 63a, 67b.
(8) 7 D. M. & G. 376.

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Oughton's Ordo Judiciorum, titulus 219, note A; and in Burn's Ecclesiastical Law (the edition by the late Sir Robert Phillimore, vol. iv. p. 386), where authorities are cited.

Both administrations durante minore ætate and durante absentia seem to be recognized by the Court of King's Bench in *Slaughter* v. *May*. (1) With regard to administrations durante absentia, there is this remarkable observation, that they were granted concurrently with the practice of giving administration to the attorney of an absent executor: see *In the Goods of Earl*. (2)

Then there are some isolated and remarkable cases which one may almost call cases of administration quousque: *In the Goods of Metcalfe* (3), *In the Goods of Campbell* (4), and the more recent case in the Probate Division of the High Court of Justice, *In the Goods of Wright* (5), which, if sound, must be supported on the principle that administration can be validly granted limited to the time when a will known to have been in existence after the death of the testator is brought in for probate.

How any of these administrations could be other than traps for the unwary if they did not enable the administrator to pass property, how if they do enable an administrator to pass property they are consistent with a theory that the property immediately on death vests in the executor and cannot be divested, even temporarily, by the Ordinary or the Court of Probate, I fail to understand. It seems to me that the true view is that till the Ordinary was concluded by probate he had for the benefit of all those interested, including, at any rate in ancient times, the soul of the deceased for the repose of which masses were to be provided, the power to commit administration and to pass the property thereby, subject to that administration being recalled and the power and title of the administrator determined upon production possibly, upon probate certainly, of a will. No doubt there is much hardship upon legatees who may find that possibly owing to the supineness of an executor, or the fraud of those about the deceased at his death, a will is not proved till the estate has been

(1) (1704) 1 Salk. 42.
(2) L. R. 1 P. & M. 450.
(3) 1 Add. 343.
(4) 2 Hagg. Eccl. 555.
(5) [1893] P. 21.

already dispersed amongst the next of kin. I quite recognize this. I observe that in Oughton in the same place which I have quoted it is said that by the course of the Prerogative Court letters of administration were never granted till at least fourteen days after death, and in one of the authorities I saw it stated that an administrator ought not to distribute among next of kin under a twelvemonth, or does so at his peril. Sect. 5 of the Statute of Distributions seems to support this. If this be the law I am well satisfied. To hold otherwise than as we are holding would make all titles of the representatives of dead persons uncertain. It is not only that an administrator may be succeeded by an executor, but the executor under one will may oust the executor of another, and the executor of a will which turns out to be forged may have to give place to an administrator, as in *Allen* v. *Dundas.* (1) It is not as if we were asked to decide that the mere discovery of a will avoided all the acts of the administrator. If the will names no executor, if the executor be dead leaving no executor, if he or his executor if he takes his place refuses to take out probate and accept the executorship, the title of the administrator would, I gather, confessedly prevail. Those who have purchased goods from an administrator may find their title depend on the caprice of an executor or of an executor's executor.

In the Court of Appeal I am not prepared to follow the actual decisions in the cases of *Graysbrook* v. *Fox* (2) and *Abram* v. *Cunningham* (3), in spite of the amount of authority and acceptance which they have enjoyed. Because:

(1.) The reasoning in the principal case lays down no consistent rule.

(2.) It is in conflict with the earlier case in the Year Book.

(3.) The two cases were decided at a time of unfortunate jealousy of the Courts Christian.

(4.) They are in conflict with the principles established by a body of unquestioned authorities.

(5.) So to decide would be to establish that a number of void orders are made as matters of course by the High Court of Justice

(1) 3 T. R. 125. (2) 1 Plowd. 275.
(3) 2 Lev. 182.

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(6.) Such a decision would put serious difficulties in the way of the realization of the estates of all deceased persons.

If this, therefore, were a case of chattels real I should hold that the administrator had a valid title and could make a good sale.

It being a case of freehold I have next to consider the Land Transfer Act, 1897, ss. 1, 2, 11, and 24.

It was not to be supposed that this Act would give an executor or administrator a better title to freeholds than he had to leaseholds. But it is to be supposed and is, I think, the case that it gives him the same title. This being so, the Act seems to me of value as supporting the view which I have taken as to the previous state of the law. Freeholds are to vest in the personal representative from time to time. Personal representative is defined to mean executor or administrator. The words are apt for this very state of circumstances. He who for the time is clothed by the Court with authority as personal representative is to have the freeholds vested in him.

I have not thought it necessary to consider the arguments of counsel for the appellant founded on the provisions of the Court of Probate Acts of 1857 and 1858 or upon s. 70 of the Conveyancing Act, 1881.

I am of opinion that this appeal should be allowed and that judgment should be entered for the appellant.

Solicitors: *Withall & Withall; Hedges & Davis.*

G. A. S.

WOOD *v.* CONWAY CORPORATION.

[1912 W. 2644.]

C. A. 1914 March 9, 10, 11.

Nuisance—Gasworks—Discharge of Noxious and Offensive Fumes—Damage to Plantation on Adjoining Property—Depreciation of Property—No House within Affected Area—Injunction—Damages.

The plaintiff was the owner and occupier of a dwelling-house and park which adjoined the defendants' gasworks. The house was situated at a distance of between 400 and 500 yards from the gasworks. Immediately adjoining the defendants' premises was a plantation of trees 16 yards in width and 75 yards in length which had been planted by the plaintiff to screen off the gasworks. The fumes and smoke from the gasworks were carried by the prevailing wind across the plantation for a distance of 100 to 200 yards on to the plaintiff's premises and had destroyed and injuriously affected them to such an extent that the tops of some of the trees were dying whilst others were dead. There was no house on the plaintiff's property within the affected area. In an action brought by the plaintiff for an injunction to restrain the defendants from carrying on their works so as to cause a nuisance or injury to the plaintiff or his property :—

Held, that the fumes and smoke discharged by the defendants' gasworks over the plaintiff's premises caused a serious, growing, and permanent injury to the plaintiff's property; that the injury being of a continuous nature it was impossible to measure the damage thereby occasioned with any certainty; and that the plaintiff was therefore entitled to the injunction he asked.

Per Buckley L.J.: If the owner of property, be it a house, or a garden, or a park, or anything else, not necessarily a house or structure, is so substantially injured in the reasonable enjoyment of his property as that he sustains that which is equivalent to a legal nuisance, he is entitled to an injunction to restrain the continuance of the nuisance.

Sturges v. *Bridgman* (1879) 11 Ch. D. 852 distinguished.

Decision of Joyce J. affirmed.

Appeal from a decision of Joyce J.

The plaintiff was the owner and occupier of a freehold property situate in the borough of Conway in the county of Carnarvon and known as "Bodlondeb." The property, which comprised about 60 acres, consisted of a dwelling-house used by the plaintiff as his residence, and the gardens, park, woods and pleasure grounds, lodges and cottages occupied therewith.

The defendants were the owners of a gasworks undertaking for the supply of gas both within and without the limits of the

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borough. The undertaking was constituted under the Conway Gas Order, 1880 (a provisional order under the Gas and Water Works Facilities Act, 1870), as confirmed by the Local Government Board's (Gas) Provisional Orders Confirmation Act, 1880, and under the Conway Gas Act, 1909. The gasworks of the defendants in connection with the undertaking were upon a piece of land acquired by the defendants for that purpose under the powers of the Conway Gas Order, 1880, and situate to the west of and adjoining the plaintiff's property.

The present action was brought by the plaintiff for (1.) an injunction to restrain the defendants from carrying on or permitting to be carried on upon their gasworks the business or undertaking of manufacturers of gas so as or in such manner as by the discharge of noxious or offensive fumes or vapours or otherwise to cause a nuisance or injury to the plaintiff's property or to the plaintiff or the members of his family or his servants occupying the same ; and (2.) damages.

In February, 1909, the plaintiff had commenced against the defendants an action of a similar nature, which was, however, discontinued on the terms embodied in an agreement dated October 8, 1909. By that agreement the defendants undertook to close certain openings in the walls of the retort house on the side next to the plaintiff's property and to close the louvre or ventilator in the roof on the same side of the retort house, and in lieu of such openings and ventilator to construct metal ventilating shafts in the roof of the retort house and to enlarge or reconstruct the said louvre or ventilator on the south-west or opposite side of the retort house for the purpose of discharging into the air and diffusing by means of the shafts at a higher level and in a less direct method than the then method (so far as regarded the plaintiff's property) vapours or fumes which according to the then construction of the retort house would pass through the circular openings and louvre so to be closed as aforesaid. The agreement contained a proviso that nothing therein contained should prejudice or affect the rights of the parties in respect of any future differences.

The defendants had in certain respects failed to carry out this agreement, and the plaintiff alleged that since the agreement was

entered into the defendants had continuously and to an ever-increasing extent discharged from their gasworks over his property noxious and offensive fumes, vapours, and smoke so as to occasion an intolerable and continually increasing nuisance to his property and himself and the members of his family and his servants occupying such property.

The defendants' area of supply having been extended by the Conway Gas Act, 1909, the defendants, in 1912, with a view to meeting the increasing demand for gas, took steps to alter and enlarge their gasworks. With this object they proposed (1.) to lengthen the retort house by 27 feet and to insert in the wall of the lengthened portion on the side next the plaintiff's property four openings 5 feet in height and 3 feet in width, thus increasing the total number of openings on that side to ten, and to extend the existing louvre or ventilator on the existing roof of the retort house along the roof of the lengthened portion of the retort house, and (2.) to fit the retort house where so lengthened with two additional benches of retorts with eight retorts in each bench, making the total number of retorts up to forty.

On September 10, 1912, the plaintiff wrote to the defendants protesting against the proposed extension and pointing out that, if it was carried out, it threatened to be the cause of further litigation between them. A correspondence thereupon ensued between the parties, but as the defendants continued to proceed with their extension, the plaintiff on October 19, 1912, issued his writ in the present action.

The portion of the plaintiff's property which adjoined the gasworks and which was in his own occupation was occupied by a plantation of trees 16 yards in width and 75 yards in length, the latter being measured along the boundary fence of the gasworks. The meadow beyond the plantation was not in the plaintiff's occupation but was let by him to a tenant for grazing purposes.

The trial of the action took place before Joyce J. in October, 1913, and occupied several days. The evidence shewed that the plaintiff's property had been injuriously affected for a distance of from 100 to 200 yards from the gasworks; that many of the trees in the plantation were dying at the tops, that some were

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actually dead, and generally that their growth had been interfered with by the smoke and fumes from the gasworks. No nuisance was proved to have been occasioned to the plaintiff's house, which was situated between 400 and 500 yards from the gasworks.

Joyce J. said that upon the evidence he was of opinion that the primary and principal if not the only cause of the damage to the plaintiff's trees was the smoke and fumes from the gasworks. That actual damage had been occasioned thereby to the trees in the plantation belonging to the plaintiff, if not to the grass in the adjoining field, which was screened by the trees, was, in his opinion, beyond question, and having regard to all the circumstances he was unable to say that the damage which had been and was being continued, and which unless stopped would continue to be occasioned in a greater degree, was of so trivial a character as not to entitle the plaintiff to maintain the action. There would therefore be judgment for the plaintiff for 40*s.* damages with costs and an injunction to restrain the defendants from carrying on their gasworks in such a manner as to cause a nuisance to the plaintiff or his property.

From this decision the defendants appealed.

The appeal was heard on March 9, 10, and 11, 1914.

Hughes, K.C., and *Owen Thompson*, for the appellants. No injunction ought to have been granted. The action was launched on the footing of a serious nuisance caused by the defendants' gasworks, but the only case proved was damage to a few trees. The damage is too trivial to support such a remedy as an injunction; a small money payment would be ample compensation. No nuisance was proved to the plaintiff's house, for it is too far off; and there was no one living on his property near enough to the gasworks to be affected. There is no such thing known to the law as a nuisance by smell or noise where there is nobody who can be affected by it. The law will not interfere in cases of smell or noise which may never be a nuisance to anybody.

[COZENS-HARDY M.R. An injunction was granted in *Hepburn* v. *Lordan* (1); but in this case there is a present nuisance, so the question does not arise.]

(1) (1865) 2 H. & M. 345.

That was a case of apprehended danger by fire, and it is one of the only two cases in which an injunction has been granted in a quia timet action. The other case is *Crowder* v. *Tinkler* (1), which was also a case of feared irreparable damage to property. The defendants will not acquire a right to an easement if they are allowed to carry on their works as at present, for an injunction can be granted whenever anybody comes to reside near their works who proves that they are then creating a nuisance: *Sturges* v. *Bridgman* (2); *Foster* v. *Warblington Urban Council.* (3) There is no probability of any nuisance in this case, for no one has any intention of building near the works. It is not analogous to light and air cases in which permanent alterations are being considered. Nuisance by noise or smell depends on the ears and noses of persons affected, and it may be stopped at any moment.

[BUCKLEY L.J. "The action is usually brought by the occupier; but where the house is unoccupied, the owner may sue on the ground of damage to his property. If the house is inhabited, the owner may sue either alone or conjointly with the occupier": Kerr on Injunctions, 4th ed. p. 141. If that is right the owner sues in respect of his right of property.]

It depends on the nature of the nuisance; for instance vibration might damage the structure.

[COZENS-HARDY M.R. referred to *Wilson* v. *Townend.* (4)]

There is no case of an injunction to restrain nuisance by noise or smell where there is no ear or nose present to be affected; it would be impossible to fix a radius within which the nuisance should be stopped. In such a case there is no injury to the owner, and his rights are not affected by his inability to take proceedings. Otherwise a manufacturer might be prevented from carrying on a business which hurts nobody. The injunction which has been granted is out of all proportion to the damage; it is in fact a mandatory injunction to the defendants to remove the gasworks.

[COZENS-HARDY M.R. Damages instead of an injunction are calculated to cover future injury.]

Now that the Court has both legal and equitable jurisdiction

(1) (1816) 19 Ves. 617.
(2) 11 Ch. D. 852.
(3) [1906] 1 K. B. 648, 678.
(4) (1860) 1 Dr. & Sm. 324.

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Lord Cairns' Act is not of so much importance. Damages can be recovered by actions from time to time for that purpose. Quia timet actions have failed in almost every case: *Attorney-General* v. *Manchester Corporation* (1); *Fletcher* v. *Bealey.* (2) Substantial injury must be proved: *Salvin* v. *North Brancepeth Coal Co.* (3) The appropriate remedy in this case is damages, not an injunction: *Aynsley* v. *Glover* (4); *National Provincial Plate Glass Insurance Co.* v. *Prudential Assurance Co.* (5); *Shelfer* v. *City of London Electric Lighting Co.* (6) The damages may be estimated on the footing that they are to compensate the plaintiff for never being able to build on his land: *Colls* v. *Home and Colonial Stores* (7); *Kine* v. *Jolly* (8); *St. Helen's Smelting Co.* v. *Tipping.* (9)

Cunliffe, K.C., and *Tomlin, K.C.*, for the respondent. There is no evidence as to the cost of moving the gasworks, but the appellants have land of their own to which they can be moved. The learned judge did not think the damage was trivial and only worth 40*s*. On the contrary he granted the plaintiff the injunction which he thought necessary. On the evidence, the injury to the plaintiff is a very serious one. The whole plantation is affected by the fumes. It is said that no case of personal nuisance is made out, but it is submitted that if the plaintiff comes in contact with these fumes he must be subjected to personal discomfort. He can only cease to come in contact with them by ceasing to use his property. His workmen are entitled to be protected against the fumes although they are working in the open air and do not live near the gasworks. When once it is established that the plaintiff's right has been infringed his right to an injunction arises, unless the circumstances of the case are such that the injury can be adequately compensated for by damages. Here the injury cannot be so compensated for: *Broadbent* v. *Imperial Gas Co.* (10) The cases decided since

(1) [1893] 2 Ch. 87.
(2) (1885) 28 Ch. D. 688.
(3) (1874) L. R. 9 Ch. 705.
(4) (1874) L. R. 18 Eq. 544.
(5) (1877) 6 Ch. D. 757.
(6) [1895] 1 Ch. 287.
(7) [1904] A. C. 179, 212.
(8) [1905] 1 Ch. 480.
(9) (1865) 11 H. L. C. 642.
(10) (1857) 7 D. M. & G. 436, 458; on appeal sub nom. *Imperial Gas Light and Coke Co.* v. *Broadbent* (1859) 7 H. L. C. 600, 610.

Lord Cairns' Act shew that all the circumstances ought to be taken into account in determining whether damages ought to be awarded in lieu of an injunction. That Act in conferring upon Courts of Equity a jurisdiction to award damages instead of an injunction has not altered the settled principles upon which those Courts interfered by way of an injunction; and in cases of continuing actionable nuisance the jurisdiction so conferred ought only to be exercised in very exceptional circumstances: *Shelfer* v. *City of London Electric Lighting Co.* (1)

[They were stopped.]

Owen Thompson in reply. *Sturges* v. *Bridgman* (2) goes a long way to shew that an action for a nuisance can only be maintained if there is a person in occupation of the premises who can be annoyed.

[COZENS-HARDY M.R. The plaintiff is in occupation of the plantation.

BUCKLEY L.J. In *Sturges* v. *Bridgman* (2) the point was that there was no nuisance until the room in the garden was built. The vibration and noise were no nuisance to the garden.]

There is no evidence here that the plaintiff uses the plantation as part of his garden. He lives a quarter of a mile away from it. The present case is analogous to that of a reversioner who cannot sue by himself where the nuisance is of a temporary character and can be stopped at any time, but must join as co-plaintiff the person in actual occupation of the premises: *Simpson* v. *Savage* (3); *Jones* v. *Chappell.* (4)

[COZENS-HARDY M.R. You do not deny that the defendants are under a statutory obligation to supply gas.]

No; and it is for that reason and having regard to the great injury and expense which the granting of the injunction would occasion the defendants that it is submitted that the case is one in which the Court ought, in the exercise of the discretion given to it by Lord Cairns' Act, to refuse to grant the injunction and to award instead such a sum in respect of damages as it thinks right.

(1) [1895] 1 Ch. 287.
(2) 11 Ch. D. 852.
(3) (1856) 1 C. B. (N.S.) 347, 360.
(4) (1875) L. R. 20 Eq. 539.

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COZENS-HARDY M.R. This is an appeal from a judgment of Joyce J., who has granted an injunction in the usual form restraining the Conway Corporation from so conducting their gasworks as to cause a nuisance to the plaintiff's property.

The plaintiff is the owner and occupier of a house called "Bodlondeb" at Conway. So far as I can see it is in a little park. The house itself is at a distance of some 400 or 500 yards from the gasworks. Some time ago a plantation of trees was made, obviously to screen off the gasworks from the house. The plantation or belt of trees, or whatever you call it, goes right up to the fence or wall dividing the plaintiff's property from the gasworks. Originally the gasworks had a small number of retorts, but the retort house was situated at a corner most distant from the plaintiff's property. Afterwards the defendants changed the position of the retort house, but it was still small. They have recently enlarged it, and have done that on the part of their premises immediately adjacent to the plaintiff's property and this plantation. The enlarged retort house will accommodate, and will in practice, when everything is finished, be worked by, I think, forty retorts. That is a very much larger number than the old house could have accommodated.

Now there were disputes some two or three years ago between the parties, and an agreement was then come to, a reference to which might possibly have been objected to on the ground of its having been made without prejudice to the rights of the parties in respect of future differences, but it has been referred to by both sides, and it is quite clear that the effect of that agreement was that any claim for wrong before the date of it was given up, and the defendants thereby undertook to do certain things, which to put it quite plainly they have not done. They have enlarged the retort house and have not stopped up the louvres, but have left them quite open on to the plaintiff's ground, and they have not, I think, by any manner of means erected the ventilating shafts which by the agreement they undertook to erect. Before these extension works were really commenced, or after they had been slightly proceeded with, the plaintiff complained of the nuisance and said "Your space is not sufficient, your extension

will be immediately next to my boundary and to my plantation, and you ought to do this objectionable work elsewhere, as you have plenty of other land available." I only mention that to shew that there was no surprise on the part of the plaintiff which ought to deprive him of such rights as he has.

According to the finding of Joyce J., and according to the facts as admitted at the Bar or shewn by the evidence, the fumes, smell, and steam come in large quantities from the gasworks on to the wood or plantation on the plaintiff's property. The prevailing wind, as Joyce J. pointed out, is from the west and blows from the defendants' gasworks directly on to the plaintiff's property. It is said that there are other days when it does not blow from the west. Of course there are, but the prevailing wind being in the direction which takes the fumes, smell, and smoke on to the plantation, the belt of trees is to some extent injured; there are some trees actually dead, others dying, and others are so decayed that I am satisfied in my own mind that unless something is done to stop it the plantation will cease to be a plantation in the course of a few years. One of the defendants' own witnesses admitted that the belt was in a very sickly condition and stated that he did not like the look of the trees, that he would not himself care to have a belt of trees in that condition, and that these trees looked very different from any other trees in the neighbourhood. I cannot bring myself to doubt that the effect of the defendants' works upon the trees in the plantation is at the present moment by no means unsubstantial, and that unless it is stopped in some way it will end by destroying the plantation.

Then it is said that the nuisance does not extend to the plaintiff's house. The plaintiff has never alleged that it did, but it is in evidence that the fumes, smell, and smoke come far over this belt of trees for a distance of from 100 to 200 yards. Indeed it is obvious that when the wind is favourable they must come right over the plantation and extend over the park. The grass in the park is let to a tenant, and in that sense the plaintiff is not in actual occupation of the field, but he is in actual occupation of the plantation, and if and when he goes to that part of his property he will personally feel the effects of the smell and dirt which

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will be found there. It seems to me that one cannot disregard that. One of the most eloquent pieces of evidence we have is the actual exhibits of parts of the trees. They have not been challenged, and anybody looking at them would be surprised at the great courage of Mr. Owen Thompson in objecting to the word "black" as applied to the trees, or even to the words "very very black." I should be disposed myself to adopt those epithets as applicable to these trees.

I cannot doubt, and I do not think any one could doubt, that there is by reason of the acts of the defendants a serious, growing, and permanent injury to the plaintiff's property. We have heard a great deal about it being temporary. That argument seems to me to have nothing whatever to do with the case. This is not the case of a man carrying on a business which he may give up next week. It is the case of a corporation which succeeded a parliamentary gas company; and, as Mr. Owen Thompson admitted and as is quite clear from the Act of Parliament, an obligation was imposed on the corporation to supply gas from their works to their customers.

Then it is said that if the injunction is to stand a great hardship will be inflicted on the defendants. They say that they cannot cure or abate the nuisance. Joyce J. said in his judgment that he did not believe that, but to my mind it is really irrelevant whether they can or cannot do so. They are now committing that which is a legal wrong and they are threatening and intending to continue it. There is no element of temporary nuisance here; even according to the defendants' own case, it is as permanent a nuisance as I ever heard of.

Then, that being so, the case seems to me to resolve itself into the question whether this Court ought to exercise the discretion given to it by Lord Cairns' Act, or by the new procedure which may be treated for all purposes as identical with Lord Cairns' Act, in favour of the defendants, and allow them to buy the right to continue the nuisance to an indefinite extent and for an indefinite time; or whether the Court ought to apply the settled principle of the Court before Lord Cairns' Act, that where there is a legal wrong which it is threatened to continue, the Court ought as a matter of course to grant an injunction. Joyce J.

hought it a proper case for an injunction. The 40*s.* he gave as damages was obviously not the measure of the present damage which the plaintiff had suffered. I can see no reason why we should differ from that view. I do not see how it is possible to measure the damages in a case of this kind with any certainty or satisfaction. Fresh actions might be brought, and a fresh question might arise on each occasion whether the damage which is then being occasioned, it may be by an increase of the works, was covered by the sum of money paid by the defendants to the plaintiff under the order of the Court in satisfaction of the entire nuisance and depreciation of the plaintiff's property. I think the observations made by Lord Campbell in the House of Lords in *Imperial Gas Light and Coke Co.* v. *Broadbent* (1) are very much in point here. He there indicates the extreme difficulty of having a succession of actions, whenever a nuisance exists, and although to some extent that difficulty is got over by the power the Court now has to assess the present depreciation to the property caused by the works, I do not think that by any means entirely removes the force of those observations.

I think the learned judge was perfectly justified in the view he took, and that this appeal must be dismissed with costs.

BUCKLEY L.J. In my opinion this appeal fails. I wish to add a few words with regard to the question of law which has been argued, and the decision in *Sturges* v. *Bridgman* (2) which has been used as the foundation of the argument. Mr. Hughes argued that, assuming the noxious fumes to be discharged upon the plaintiff's land, there was no cause of action, because there was no house within 200 yards of the works and consequently no occupier who could suffer by the nuisance. That argument, to my mind, is wholly unsound. The true rule of law, I apprehend, is that, if any owner of property, be it a house, or a garden, or a park, or anything else, not necessarily a house or structure at all, is so substantially injured in the reasonable enjoyment of his property as that he sustains that which is equivalent to a legal nuisance, he is entitled to an injunction to restrain the continuance of that nuisance. It will be obvious

(1) 7 H. L. C. 600, 610. (2) 11 Ch. D. 852.

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that if Mr. Hughes' argument were sound these results would follow. Suppose a man loses all his tenants by reason of the existence of the nuisance and cannot get another tenant, he is without remedy because there is no occupier, and therefore no person resident in the house with a nose to smell or with ears capable of being offended by noise. Or suppose he has no house upon his land, and he erects a house and tries to get a tenant but cannot do so, he is without remedy because he is without an occupier of his house, although the want of an occupier is due to the existence of the nuisance. The argument is based on the decision in *Sturges* v. *Bridgman.*(1) It is true that the Court of Appeal there said that the nuisance up to the time when the physician built his consulting room at the bottom of the garden in Wimpole Street was not actionable. On that decision Mr. Hughes has founded himself. That decision rested, I think, upon the fact that so long as the back garden in Wimpole Street was used as a garden the vibration in question was no nuisance. The point of the case was not that there could not be a nuisance except in connection with a house, but that until a house existed there was no nuisance, because the vibration and noise were not such as constituted a legal nuisance upon property which was used as a garden. It is obvious that that is not this case. If the facts are that persons who walk in the plaintiff's meadow or in the spinney or plantation adjacent to the gasworks are offended now in their noses or otherwise by the noxious fumes sent over the land, the owner and occupier of the property is injured, and none the less so because there is not a house there. It is not necessary to be in a house in order to be offended by a smell. The right to an injunction results, if the reasonable enjoyment of the property is affected by the nuisance. Moreover, I have no doubt myself that the owner, as distinguished from the occupier, may sue, and obtain an injunction in respect of a nuisance which substantially affects the value of his property. It is not right to regard the property only in the condition in which it is now. It is settled in cases of light that the test is not whether the plaintiff's enjoyment of light as utilized by him

(1) 11 Ch. D. 852.

at the time in the occupation of his house has been interfered with. He may alter the user of his house and may want to enjoy light for special purposes, and he is entitled to do so. Lord Westbury's decision in *Jackson* v. *Duke of Newcastle* (1) to the contrary of this view is not law: see *Yates* v. *Jack* (2) and *Aynsley* v. *Glover* (3) It is true that in such a case the plaintiff is asserting affirmatively a right of property, and there is no doubt a distinction in that respect from that case and this, where the plaintiff is asserting negatively a right to protect his property from sulphur, but I do not think there is any difference in point of principle. In point of principle the plaintiff is entitled to say that his property, as it is now, or as he may be entitled to use it hereafter, is injuriously affected by the nuisance the defendants are committing, and that the value of his property is affected. In respect of that, I think, the plaintiff is entitled to sue.

Upon the facts I need say little. It is indisputable that there are noxious fumes and smells from these gasworks. It is not disputed that the effect upon the trees is substantial, although as a matter of money not a large amount is involved. That, however, is not the measure of the damage. The fact is that these fumes are discharged over the land in such a way that the land is rendered less capable of beneficial enjoyment for the purposes for which the plaintiff is entitled to enjoy it, and in respect of that he is entitled to sue. I may add as regards the reasonableness of the plaintiff's conduct that from 1909 onwards he has been raising objections to the way in which these works were conducted, and that, notwithstanding the agreement that was come to in 1909, the defendants did not comply with the obligation which they then undertook with regard to stopping or abating the nuisance. After his protest, they deliberately made the further additions, and built the extension of the retort house, leaving the louvres open so that the fumes from the old retort house and its extension, which now form one building, could escape through the louvres. They enlarged their buildings with notice of his objection, and so brought about the present state of things. It does not lie in

(1) (1864) 3 D. J. & S. 275. (2) (1866) L. R. 1 Ch. 295, 298.
(3) L. R. 18 Eq. 544, 549.

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their mouth to say that they will be exposed to considerable expense if after erecting these additional buildings they have to go elsewhere. If the result is an unfortunate one for them, they have brought it on themselves. Upon the facts it seems to me that an abundant case of nuisance is made out. I think the plaintiff is entitled to the injunction he has obtained.

CHANNELL J. I entirely agree with the judgments that have been delivered. I should like to say a few words upon the point that impressed me most in the case. I entirely accept the findings of the learned judge in the Court below upon the facts, and as far as the evidence has been read to us, I think it supports those findings and certainly shews no ground for differing from them.

Assuming these facts, the only question that seems to me to be fairly open to doubt is whether this is a case in which the Court ought properly to exercise its discretion and give damages in lieu of an injunction. The effect of such an order is that the Court gives compensation in advance for the continuance of the injury or damage complained of, which it is declining to prevent by refusing an injunction. It is easy to do that when the Court is dealing with the case of a building which obstructs light, or a wall or sewer which encroaches a little over the owner's boundary into his neighbour's land. Those cases are easy to deal with, but here what is complained of is a nuisance arising by the process of making gas, and, if the works are altered, or if the process is altered, the question will always arise whether the damage that is being done after the alteration is the damage compensated for under the order of the Court. It seems to me that in a case such as the present it is not only impossible fairly to assess the damages, but it is also impossible to foresee exactly what will be done in the future that will cause damage; and that it is a case in which the Court cannot reasonably act upon its discretion and give damages in lieu of an injunction. In the present case I should be inclined to do it if it were practicable, because I think it is the fact that the damage which will be caused to the defendants by this injunction is, measured pecuniarily, far in excess of the damage which would be caused

to the plaintiff by the continuance of the nuisance; but that is not enough to enable the Court to make such an order as this, if it is to do justice between the parties.

On these grounds I think it is impossible to accede to the suggestion that the Court should make such an order. I agree, therefore, that the appeal ought to be dismissed.

Solicitors: *Gibson & Weldon, for J. W. Hughes, Conway; Sharpe, Pritchard & Co., for Porter, Amphlett & Co., Conway.*

W. I. C.

In re WILLIAMS.
METCALF *v.* WILLIAMS.

[1913 W. 2646.]

C. A. 1914 *March* 17, 18.

Will—Construction—Words of Futurity—Gift to Children of Child of Testator "who shall die in my lifetime"—Child dead at Date of Will leaving Children.

A testator bequeathed the sum of 250*l.* to his grandchildren J. and G., children of his son P., equally share and share alike should they attain the age of twenty-one years, and he gave his residuary estate "In trust for all my children living at my decease who being sons shall attain the age of twenty-one years or being daughters shall attain that age or marry in equal shares . . . . Provided always that if any child of me shall die in my lifetime leaving a child or children who shall survive me and being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry then and in such case the last mentioned child or children shall take (and if more than one equally between them) the share which his her or their parent would have taken of and in the residuary trust funds if such parent had survived me and attained the age of twenty-one years." P., to the knowledge of the testator, was dead at the date of the will. The other children of the testator and also J. and G. survived him, and some of the children had attained twenty-one at the date of the will:—

Held, that J. and G. on attaining twenty-one or marriage took the share in the residuary trust funds which their parent would have taken if he had survived the testator and attained twenty-one.

Per Buckley L.J.: Observations on the use and meaning of the word "shall."

Decision of Sargant J. [1914] 1 Ch. 219 affirmed.

APPEAL from Sargant J. (1)

Philip Williams, by his will, dated June 12, 1900, directed

(1) [1914] 1 Ch. 219.

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payment of his just debts and funeral and testamentary expenses, and bequeathed the sum of 250*l.* to his grandchildren Philip John Williams and Grace Elizabeth Williams, children of his son Philip Parfitt Williams, equally, share and share alike, should they attain the age of twenty-one years; and he directed that if either of them should die before attaining twenty-one the survivor should be entitled to the whole of the said sum of 250*l.*, and that in the event of both of the said children dying before attaining twenty-one the said sum should fall into residue and form part of the testator's residuary estate. The testator then gave all the residue of his estate to trustees upon trust to convert and pay his debts and funeral expenses and invest the residue and hold the same "In trust for all my children living at my decease who being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry in equal shares and if there shall be only one such child the whole to be in trust for that one child And I declare that the share of each of my daughters shall be for her separate use and free from the control of any husband with whom she may intermarry Provided always that if any child of me shall die in my lifetime leaving a child or children who shall survive me and being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry then and in such case the last mentioned child or children shall take (and if more than one equally between them) the share which his her or their parent would have taken of and in the residuary trust funds if such parent had survived me and attained the age of twenty-one years."

The testator died on November 29, 1903, having had three sons and five daughters, all of whom survived him, with the exception of one son, Philip Parfitt Williams, who died in 1899, and of whose death the testator was shewn to have known at the time when the will was made. Some of the children had attained twenty-one at the date of the will.

Philip P. Williams left two children, the above-named Philip John Williams and Grace Elizabeth Williams. Some of the children took out this summons for the determination of the question whether the testator's grandchildren Philip John

Williams and Grace Elizabeth Williams were entitled to a share of the residuary estate contingently upon the former attaining twenty-one and the latter attaining that age or marrying, and Sargant J. held that the defendants were contingently entitled on attaining twenty-one, or in the case of Grace Elizabeth Williams on her previously marrying, to the one-eighth share in the residuary trust funds which their parent Philip Parfitt Williams would have taken if he had survived the testator.

The plaintiffs appealed.

Peterson, K.C., and *P. F. Wheeler*, for the appellants, referred to *Gorringe* v. *Mahlstedt* (1); *Barraclough* v. *Cooper* (2); *In re Cope* (3); and *In re Lambert.* (4)

Owen Thompson, for the respondents, was not called upon.

COZENS-HARDY M.R. This is an appeal raising a question which often comes before us, whether the case is one which falls within *Loring* v. *Thomas* (5) or within the other class of cases of which *Christopherson* v. *Naylor* (6) is an example.

I propose to read this will as an ordinary man would and construe it without allowing myself to be influenced by the numerous authorities except to this extent, that I must hold that the words "shall die" are equivalent to "shall be dead"—that is quite well settled.

The testator had three sons and five daughters, all of whom survived him except his eldest son, who died in the testator's lifetime and before he made his will. The testator gave his residue "In trust for all my children living at my decease who being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry in equal shares." On that clause alone there is no difficulty; it is quite plain. There is a gift to such of the children as shall be living at the testator's decease and who shall attain the age of twenty-one—that is to say, there is a gift to a contingent class.

Then comes this clause: "Provided always that if any child

(1) [1907] A. C. 225.
(2) (1905) [1908] 2 Ch. 121, n.
(3) [1908] 2 Ch. 1.
(4) [1908] 2 Ch. 117.
(5) (1861) 1 Dr. & Sm. 497.
(6) (1816) 1 Mer. 320.

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of me shall die in my lifetime leaving a child or children who shall survive me and being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry then and in such case the last mentioned child or children shall take (and if more than one equally between them) the share which his her or their parent would have taken of and in the residuary trust funds if such parent had survived me and attained the age of twenty-one years." Now reading that as an ordinary man uninfluenced by the numerous authorities, I do not feel a doubt about the meaning of the will. The testator says in effect, "There may or may not be living at my decease children of a child of mine already dead, and if there are any such children, and if they attain twenty-one or being daughters marry, then the class of persons which takes under the earlier gift is to be augmented and increased by the inclusion of those grandchildren." That is, there are two original gifts, the first to the testator's children who survive him and attain twenty-one, and a further gift to any children of a child of the testator already dead who survive the testator and attain twenty-one. It seems to me to give full effect to every word in the will if I say, as I am bound to say, that the words "shall die" are equivalent to "shall be dead," and reading those words in that way I feel no difficulty in construing this will.

It is a question of intention in the case of each will. I must say that the judgment of Romer L.J. in *Barraclough* v. *Cooper* (1) has been very useful in helping me to arrive at the conclusion to which I have come. That case is practically indistinguishable from this.

The appeal must be dismissed.

BUCKLEY L.J. In the English language the word "shall" may be expressive of futurity, or may be expressive of condition apart from futurity, or may be expressive of obligation apart from either futurity or condition. "Shall" is habitually used for "should." The indicative is frequently used for the subjunctive. For instance, we say "if it is" instead of "if it be."

(1) [1908] 2 Ch. 121, n.

"If A. B. shall attain twenty-one" may mean either "if A. B. shall in the future attain twenty-one" or "if, on inquiry, it shall be found that A. B. has the qualification of attaining twenty-one." It may mean either (1.) "if A. B. shall hereafter obtain the qualification of attaining twenty-one," or (2.) "if A. B. shall be found to be a person who has obtained the qualification of having attained twenty-one." In construing this will I have to see what words the testator has used and whether he has used the word "shall" as expressive of futurity or not.

By the first gift the testator gave his residue in trust for all his children living at his decease who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, in equal shares. Then follows a proviso. A proviso, in the strict sense, must be a qualification upon what precedes it; but this so-called proviso is not really a qualification upon the preceding gift. It operates rather by way of an addition to the clause which precedes it. The proviso says "that if any child of me shall die in my lifetime leaving a child or children who shall survive me" and attain twenty-one or marry—a complex event—such child or children shall take the share which his, her, or their parent would have taken. That clause is a clause not of substitution but of addition, unless it is to be read as the appellants contend, and as if the words were "if any such child" or "if any of the said children."

I have to construe this will. This word "shall" is used five times in the relevant clause—(1.) "if any child of me shall die in my lifetime"; that may mean if any person, being a child of mine, shall hereafter die in my lifetime, or may mean if any person, being a child of mine, shall be found to have attained the qualification of having died in my lifetime: (2.) "leaving a child or children who shall survive me"; "shall" is superfluous there, because the preceding words "shall die" have already imported "shall," whatever that means: (3.) and (4.) "and being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry." Ought I to say that that means shall hereafter attain twenty-one? Is it likely that the testator would have meant that only those persons

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were to take under his will who after the date of his will or his death attained twenty-one? Is it not rather expressive of qualification in the sense that "shall" means "shall be found to be a person who attains his majority" and that whether he does so before or after the date of the will or death makes no difference?: (5.) "shall take" the share which his parent would have taken. "Shall" is there expressive of obligation.

That being the context, what is the true meaning of "provided always that if any child of me shall die in my lifetime"? Note that the words are "any child of me," not "any such child" or "any of the said children." It means, I think, if any person, of whom it may be predicated that he shall be found to be a child of mine, dies in my lifetime, then his children who survive me and attain twenty-one are to take the share which their parent would have taken if such parent had survived me and attained twenty-one. I do not cite any authorities. They give, I think, no assistance. I have only to find the true meaning of this particular will.

CHANNELL J. I agree. I will only say one word on a point which the Master of the Rolls and Buckley L.J. have not mentioned. I should not add anything if this case depended on the earlier cases, for I most thoroughly agree with the view that it is not desirable to put a meaning on any particular will by trying to see how near it comes to wills construed in former cases. I cannot put myself in the position of an ordinary man who has not been puzzled by those decisions, for I confess that I have been.

I cannot help thinking that any ordinary person looking at this residuary gift alone would put upon it the meaning which the Master of the Rolls and Buckley L.J. have put on it, but there might be other people who, looking at this clause after reading the earlier clause, might say that there was already a clause which did provide for these two children and which has given them a legacy of 250*l.* each, and an ordinary person who was speculating about the meaning of the testator might say that the testator had not meant in the residuary clause to include these two children, because he, no doubt, had present to his mind

the death of his child, and that he meant to provide by the residuary clause only for his children living at the date of his will and the children of such of them as should subsequently die in his lifetime. But would that be sound? I do not think it would, although it strikes one as a matter to be considered.

The residuary clause must be construed as it stands, and any opinion as to the testator's probable intention by reason of the testator having made some provision for these particular grandchildren would be mere speculation not depending upon the terms of the will, for one cannot really be sure whether the testator might have meant the legacy to be the only provision for these two grandchildren or whether he might have thereby intended to give them purposely a little more of his estate than he was giving to the others. To cut down the residuary clause by reason of the earlier bequest would be speculating on his motives and not going by the words of the will. Therefore I think that what might perhaps strike one in the first instance does not really prevent me from agreeing with the judgments already given.

Solicitors: *Kinch & Richardson, for Lloyd & Pratt, Cardiff.*

R. M.

C. A.
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March 18, 28.

In re BENZON.
BOWER *v.* CHETWYND.

[1913 B. 2432.]

Bankruptcy—Donee of General Testamentary Power of Appointment—Adjudication—No Discharge—Exercise of Power—Death of Bankrupt—Administration Action—Appointed Fund—Claim by Creditors in the Bankruptcy for Balance of Unsatisfied Debts—Lapse of Time—Limitation Act, 1623 (21 *Jac.* 1, *c.* 16).

The donee of a general testamentary power of appointment over a fund of 15,000*l.* was adjudicated bankrupt in January, 1890, and a small dividend was paid. Early in 1892 the donee was again adjudicated bankrupt, but no dividend was paid. The donee never obtained his discharge in either bankruptcy, and died in July, 1911, having by his will duly exercised his power of appointment. In an action for the administration of his estate, which consisted almost entirely of the appointed fund, the creditors in the bankruptcies claimed to be paid the balance still remaining unsatisfied of their respective debts:—

Held by Warrington J., following his own decision of *In re Guedalla* [1905] 2 Ch. 331, that the creditors in the bankruptcies were precluded by the effect of s. 9 of the Bankruptcy Act, 1883, from claiming against the appointed fund and that their claims must be disallowed.

Held by the Court of Appeal (without expressing any opinion upon the grounds of the decision in the Court below), that although the appointment and death gave creditors a new fund from which to get payment and a new mode of proceeding in order to get it, yet that was merely a new remedy and not a new cause of action, the cause being really the old debt; that the Statute of Limitations having begun to run against the appellants before the commencement of the bankruptcy, continued to run notwithstanding the bankruptcy; and that the claims of the appellants, not being claims in the bankruptcy, were barred by lapse of time.

Appeal from an order of Warrington J.

The above-named deceased, Henry Ernst Schlesinger Benzon, was the donee of a general testamentary power of appointment under the will of his father over a fund of 15,000*l.* and accumulations. He was adjudicated bankrupt in January, 1890, a small dividend was paid, and the trustee under that bankruptcy was released on July 18, 1893, but the bankrupt never obtained his discharge. He was again adjudicated bankrupt in March, 1892; the official receiver was appointed trustee, no dividend was paid,

and the official receiver was released in November, 1892, but the bankrupt never obtained his discharge.

The bankrupt died in July, 1911, having by his will appointed the plaintiffs his executors and duly exercised his power by appointing that the trustees of his father's will should stand possessed of the said fund and accumulations upon trust to pay thereout his funeral expenses and certain legacies, and subject thereto to divide the same into three equal parts and to pay one of such equal parts to the defendant and to each of the other two persons therein named.

The plaintiffs proved his will, and subsequently commenced this action for the administration of his estate, which consisted almost entirely of the appointed fund.

In the course of the administration the question arose whether the claims should be allowed of the creditors in the first and second bankruptcies, who, pursuant to the advertisement for creditors, had sent in claims for the balance still remaining unsatisfied of their respective debts in those bankruptcies. Warrington J., following his own decision in *In re Guedalla* (1), held that the creditors in the bankruptcies were precluded by the effect of s. 9 of the Bankruptcy Act, 1883, from claiming against the appointed fund, and disallowed the claims.

In consequence of the view thus taken by the learned judge the plaintiffs had no occasion to rely upon the Statute of Limitations in the Court below.

The creditors in the bankruptcies appealed.

E. W. Hansell, for the appellants. The contention urged against the claim of the appellants is that because they proved in the bankruptcy they are not entitled to come in on the administration of the estate because s. 9 of the Bankruptcy Act, 1883 (2), in some

(1) [1905] 2 Ch. 331.

(2) The section is as follows:—

"9. (1.) On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal

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way prevents them from claiming against these assets. But I submit that though this fund is not assets passing to the official receiver in the bankruptcy, it is nevertheless a fund open to the creditors at the time of the debtor's death. Warrington J. followed his own decision in *In re Guedalla* (1) and disallowed the claim. This Court considered the effect of the exercise of a general power of appointment in *In re Hadley* (2), and that case shews that the appointed moneys are assets for the payment of all those who remain creditors at the time of the death of the donee of the power. That case was referred to and followed by this Court in *In re Pryce.* (3)

Warrington J. referred to the case of *Jenney* v. *Andrews* (4), but that is a case which is really in favour of the appellants when the circumstances of the case are considered. It was decided in 1822 and the testator had obtained his certificate; consequently at the time of his death the creditors were barred under the Act of George II. by virtue of the effect of the certificate, which amounted to a discharge. In the present case if the debtor had obtained his discharge it might have been said that the debt was gone, but he did not get his discharge, and the Vice-Chancellor in *Jenney* v. *Andrews* (4) was clear that but for the certificate the creditors would have been entitled to come in.

This fund by reason of the exercise of the power became assets for the payment of the debts of all persons who were creditors at the death of the bankrupt, and the appellants were such creditors. All that they had done before that was to give a receipt for so much as they had received in the bankruptcy. This fund was not part of the property of the debtor at the time of the bankruptcy so as to come within s. 9, sub-s. 1, but it is part of the property of the debtor now. This is not a claim "against the property or person of the debtor," and s. 9 really has nothing to do with it. That section refers only to property over which the Court of Bankruptcy has control, and s. 44 shews what that property is.

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proceedings unless with the leave of the Court and on such terms as the Court may impose."

(1) [1905] 2 Ch. 331.

(2) [1909] 1 Ch. 20.

(3) [1911] 2 Ch. 286.

(4) (1822) 6 Madd. 264.

The appellants are not barred by the Statute of Limitations. That point was not pursued in the Court below.

Cave, K.C., and *F. Mellor*, for the respondents. This is an application to review the decision in *In re Guedalla* (1), which has stood for nearly nine years. It is said that the fund in question did not pass to the official receiver in the bankruptcy but is now available for payment of these debts. The answer to that is that if a creditor chooses to come in under the bankruptcy, then he is relegated to his rights in the bankruptcy. Sect. 44 of the Act of 1883 vests in the trustee all the property of the debtor and the right to exercise all powers which might be exercised by him. It is not disputed that this particular fund did not pass to the trustee and that he could not exercise a power which was merely testamentary, so that this fund was not available under the provisions of the Bankruptcy Act. The death of the bankrupt has not made any difference. By s. 108 the death of the bankrupt has no effect in bankruptcy proceedings, which go on notwithstanding the death: *In re Walker* (2); nor does the death give a new remedy to the creditor, for s. 9 provides that after the making of a receiving order no creditor shall have in respect of any debt provable in bankruptcy any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court. No leave has been obtained in the present case.

[COZENS-HARDY M.R. If the appellants cannot claim in these proceedings without the leave of the Court, then we think we ought to give them leave to come in.]

They are not creditors of the estate to-day. They were creditors then, but they took advantage of the bankruptcy and s. 9 applied and took away their right of action. It would be an extraordinary result if the death of the bankrupt were to revive a debt against him. The appellants cannot take part in this action or proceeding without the leave of the Court, and if the Court thinks fit to give them leave then we shall rely fully on the fact that this is a proceeding to recover a debt and raise every defence open to us.

(1) [1905] 2 Ch. 331. (2) (1886) 3 Morrell, 69.

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In *In re Hadley* (1) the question was whether under the exercise of a general power of appointment the appointed fund passes to the donee's executors as such, and although useful for the dicta which it contains is not otherwise in point. *Jenney* v. *Andrews* (2) is more relevant and turned upon a certificate which had been obtained, but the Vice-Chancellor does not say what would have been the result if the debtor had not obtained his discharge.

It was not necessary to rely upon the Statute of Limitations in the Court below, but we rely upon it in this Court and submit that in any event the appellants' right is barred. It is not correct to say that their right did not arise until the bankrupt's death in 1911. This debt is more than twenty years old and the statute of James applies, and there is no provision in the Act for suspending the right once it has begun to run. *In re Crosley* (3) can be explained on the ground that, whether fraud is concealed or not, time does not begin to run against fraud in a Court of Equity until the fraud is discovered. In that case time had not begun to run previous to the bankruptcy and it did not run during the bankruptcy. When time has once begun to run it will continue to do so, even though subsequent events occur which render it an impossibility that an action should be brought: *Ex parte Ross* (4); *Rhodes* v. *Smethurst* (5); Darby and Bosanquet on the Statutes of Limitation, 2nd ed. p. 25.

E. W. Hansell in reply. The appellants have living debts, and they have come in in answer to the advertisement, for the purpose, not of bringing an action, but of saying that this is a fund applicable for payment of those debts. This cause of action arose only in 1911, when the bankrupt died without having revoked his will. Unless and until this fund came into existence they had no opportunity of making the claim which they are now submitting. This illustrates the difference between power and property. During the bankrupt's life this fund was not property which would pass to his trustee, but once the power is exercised the appellants' right to claim against it arises.

Further, the bankruptcy operated to suspend the running of

(1) [1909] 1 Ch. 20.
(2) 6 Madd. 264.
(3) (1887) 35 Ch. D. 266.
(4) (1827) 2 Gl. & J. 330.
(5) (1838) 4 M. & W. 42.

the Statute of Limitations. In *Ex parte Ross* (1), Lord Lyndhurst says that it is an admitted rule that unless debts are already barred by the Statute of Limitations when the trust for the benefit of creditors is created, they are not afterwards affected by lapse of time. In *In re General Rolling Stock Co.* (2) the Court held that from the date of a winding-up order under the Companies Act, 1862, the Statute of Limitations did not run against a creditor, and in *Ex parte Lancaster Banking Corporation* (3), where the bankrupt, after the close of the bankruptcy, became entitled to 20,000*l.* in an action for the administration of the will of a testatrix, Bacon C.J. allowed the claim of a creditor who had not proved before the close of the bankruptcy. *In re Crosley* (4) shews that the Statute of Limitations does not run during the bankruptcy. I submit, therefore, that if a new right of action did not arise in 1911, at any rate the bankruptcy prevented the Statute of Limitations from continuing to run in respect of the original right of action, and that the appellants' claims are not barred.

Cur. adv. vult.

On March 28 the judgment of the COURT (Cozens-Hardy M.R., Buckley L.J., and Channell J.) was delivered by

CHANNELL J. This is an appeal from an order of Warrington J. which he made in an administration suit, after little or no argument, on the authority of a previous decision of his own reported in *In re Guedalla.* (5) It was admitted here and below that the present case was governed by the second point decided in *In re Guedalla* (5), and this appeal therefore is in substance an appeal from the decision in that case on the second point. In the case before us, however, there arises upon the facts a further point as to the effect of the Statute of Limitations which did not arise in *In re Guedalla.* (5)

In the Court below the respondents on this appeal had no occasion to rely, and did not rely, on the Statute of Limitations, because they had in their favour a clear decision which was

(1) 2 Gl. & J. 330, 332.
(2) (1872) L. R. 7 Ch. 646.
(3) (1879) 10 Ch. D. 776.
(4) 35 Ch. D. 266.
(5) [1905] 2 Ch. 331.

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binding there; here, however, where that former decision can be and is challenged, it is material for them to raise the question of the statute.

There was some discussion between counsel as to whether the point had been so abandoned below as to prevent its being raised here, but as it arises clearly upon the facts before us, and, if a good point, could not have been met below by any evidence, we think it is clearly open.

The deceased H. E. S. Benzon became bankrupt in 1890 and again in 1892. The appellants who were creditors in the first bankruptcy were creditors prior to 1890 and proved their debts in the first bankruptcy. They have received some dividends but have not been paid in full. The other appellant was a creditor before 1892 and proved his debt in the second bankruptcy, but no dividend has been paid. The bankrupt never obtained his discharge in either bankruptcy. He died in July, 1911, having made a will whereby he executed a general power of appointment which he had under the will of his father over a sum of 15,000*l.* This power he could only exercise by will. The fund therefore became assets for the payment of the deceased's debts (see *Jenney* v. *Andrews* (1), *In re Hadley* (2), and other cases). In *In re Guedalla* (3) the first point decided was that such a fund, though assets for the payment of debts, was not property passing to a trustee in bankruptcy, and on this point the decision of Warrington J. is not, I think, challenged; at any rate it does not appear open to any fair doubt. The learned judge, however, went on to hold that the creditors in the bankruptcy were precluded by the effect of s. 9 of the Bankruptcy Act from claiming on the fund. That they would be precluded if the bankrupt had obtained his discharge is of course clear, but as he had not, the question, apart from the Statute of Limitations, turns entirely on s. 9. It is the decision on this point which the appellants now ask us to overrule, and their argument is that the claim is not one "against the property or person of the debtor" within the meaning of s. 9 inasmuch as the fund never did or could become the property of

(1) 6 Madd. 264. (2) [1909] 1 Ch. 20.
(3) [1905] 2 Ch. 331.

the debtor, although his exercise of the testamentary appointment made it, after his death, assets for the payment of his debts.

Having regard to the view we hold on the point of the Statute of Limitations, it is not necessary for us to decide the points arising on the construction of s. 9, either as to its barring the remedy or requiring the leave of the Court of Bankruptcy before the claim is made under the administration, and therefore unnecessary to say whether in our opinion the decision of Warrington J. on the second point which he decided in *In re Guedalla* (1) is right or not.

On the point of the Statute of Limitations, inasmuch as the debts were incurred by the bankrupt before 1890 and 1892 respectively, they would prima facie have been barred long before his death in 1911. The contentions of Mr. Hansell on this point on behalf of the appellan's were, first, that the exercise of the power of appointment which made the fund available as assets gave them a new right of action or proceeding which was not barred, and, secondly, that, even if that was not so, the effect of the bankruptcy was to prevent the statute running. To the first of these points the answer is that the words of the statute are six years "next after the cause of such actions or suits," and although the appointment and the death gave creditors a new fund from which to get payment and a new mode of proceeding in order to get it, yet this was merely a new remedy and not a new cause of action, the cause being really the old debt. As to the second point, cases were quoted beginning wit'i *Ex parte Ross* (2), which shew that in the bankruptcy a debt does not become barred by lapse of time if it was not so barred at the commencement of the bankruptcy, and of this there can be no doubt, but this is only *in the bankruptcy*. From the nature of the case, as there are usually no means of recovering a debt provable in a bankruptcy other than under the machinery of the bankruptcy, there is likely to be little authority on the point whether bankruptcy keeps alive the right to take such other remedies, if there are any notwithstanding the lapse of time, and we find no direct authority on this point.

(1) [1905] 2 Ch. 331. (2) 2 Gl. & J. 330.

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The real difficulty in the way of the appellants is the well-established rule that if the statute once begins to run it continues to run whatever happens. The only case we can find in the books where the running of the statute has been said to have been suspended is a decision of Lord Chelmsford L.C. in *Seagram* v. *Knight* (1); but that was a peculiar case on very special facts, and, whatever view may be taken of it, it clearly is not an authority in the present case. The general rule is clear; *Coply* v. *Dorkmincque* (2), where after the time had begun to run the Courts were closed owing to the rebellion and no action could be brought, is a very strong case. *Rhodes* v. *Smethurst* (3) is another strong case, where the whole matter was carefully considered. The principle of the rule—if on such a technical matter there can be said to be any principle—appears to be that if any man has a cause of action which is ripe so that he has an opportunity of bringing his action and does not do so, he thereby takes the risk of some unexpected event happening which takes away from him the possibility of bringing his action within the remainder of the period which he has under the statute. The rule may work hardship in particular cases, but it is so well established that no Court would now decline to follow it.

The case most relied on by Mr. Hansell was *In re Crosley* (4), but there Cotton L.J. and Lindley L.J. (with whom Lopes L.J. agreed) both lay stress on the fact that there the statute did not *begin* to run until after the bankruptcy. The stress they laid on the word "begin" shews that they had in their minds the rule as to the time continuing to run if it once began, and that they did not mean to depart from that rule. As to the date when time did begin to run in that case they appear to have been acting on the rule of equity that time runs from the discovery of a fraud and not from the date of its being committed. It is not quite clear that even at common law the creditor there would not have had a cause of action beginning after the bankruptcy, but even if the Court there were wrong in holding on the facts that the cause of action had only arisen after the bankruptcy,

(1) (1867) L. R. 2 Ch. 628.
(2) (1676) 2 Lev. 166.
(3) 4 M. & W. 42.
(4) 35 Ch. D. 266.

they did so hold and it was the ground on which they decided that the claim was not barred.

There was some suggestion that the payment and receipt of dividends might take the case out of the statute, but a payment to have that effect must be a payment from which a promise to pay the balance could be inferred. No such promise by the debtors could be inferred from a payment of a dividend by the trustee. We think the statute applies and is fatal to the appellants' case. The fund is only assets for the payment of debts which are not barred, and in fact there are other creditors in this case whose debts were incurred after the bankruptcy but more than six years before the death whose claims have alrea ly been rejected. It would be curious if the effect of the bankruptcy were to make these much older claims maintainable.

This appeal must be dismissed, and, of course, with costs.

Solicitors: *Stoker & Hansell; Johnson, Weatherall & Sturt.*

R. M.

In re BRITISH UNION AND NATIONAL INSURANCE COMPANY, LIMITED.

[1913 B. 0110.]

Insurance—Life Assurance—Deposit—Life Policy—Policy Holder—Agreement for Employment in Life Department—Annuity granted in Compromise of Action for Breach of Agreement—Charge on Deposit—Assurance Companies Act, 1909 (9 *Edw.* 7, *c.* 49), *ss.* 1 (*a*), 2; *s.* 3, *sub-s.* 2; *s.* 30 (*a*), (*b*).

An annuity granted by way of compromise of a claim for damages against a life, fire, and accident assurance company for breach of contract by the life department is an annuity within s. 30 (*b*) of the Assurance Companies Act, 1909, and the annuitant is a policy holder and has a prior claim to be paid out of the life deposit.

The company was incorporated to carry on every kind of insurance except employers' liability insurance and to grant annuities of all kinds, whether dependent upon human lives or otherwise, and a sum of 20,000*l.* was paid into Court as deposit under the Life Assurance Companies Acts, 1870 to 1872. The company was now being wound up under supervision and the claims on life policies had been satisfied.

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The manager of the life department brought an action against the company for breach of his agreement of employment, and the action was settled on terms whereby the company was to pay him a life annuity of 240*l.*, and he was to release the company from all claims. On a petition by the company and its liquidator for the payment out of Court of the deposit fund to the liquidator, after payment of the charges thereon, for distribution as part of the assets of the company, the manager claimed that his annuity constituted a charge on the life deposit fund in priority to any claims other than life assurance claims:—

Held (reversing on that point the decision of Astbury J. [1914] 1 Ch. 724), that the claimant's annuity was a life annuity within the Act of 1909 so as to give him a prior claim on the deposit fund.

APPEAL from a decision of Astbury J. (1)

This was a petition by the above company and its liquidator for the payment out of Court of a sum of 20,000*l.* deposited under the Life Assurance Companies Acts, 1870 to 1872.

The company was incorporated on November 24, 1909, under the Companies (Consolidation) Act, 1908, to carry on (inter alia) every kind of insurance business except employers' liability insurance business and to grant annuities of all kinds whether dependent upon human lives or otherwise.

On June 24, 1909, a sum of 20,000*l.* was paid into Court under the Life Assurance Companies Acts, 1870 to 1872, on the authority of an order of the Board of Trade dated June 9, 1909.

Shortly after its incorporation the company commenced to carry on life, fire, and accident insurance business besides general insurance business not falling within the five classes of business mentioned in the Assurance Companies Act, 1909.

Under r. 10 of the Board of Trade Rules of June 6, 1910, as to deposits (Statutory Rules and Orders, 1910, No. 566) the deposit fund was prima facie and in default of reason to the contrary to be treated and dealt with as having been made in respect of the life assurance business. These rules are set out in Bunyon on Life Assurance, 5th ed. p. 567, and Bunyon on Fire Insurance, 6th ed. App. A, p. lxiv.

During 1910 the company carried on the business of industrial life assurance as well as ordinary life assurance, but towards the

(1) [1914] 1 Ch. 724.

end of 1910 it discontinued the former, and all industrial life policies had long since lapsed, been satisfied, or provided for.

On June 17, 1912, the company was wound up by extraordinary resolution and on July 2, 1912, a supervision order was made.

At the date of the liquidation there were only nine life policies outstanding. The claims on these were compromised and satisfied, eight with the sanction of the Court and the remaining one out of Court.

There were, however, 350 claimants on fire and accident policies whose claims amounted to 37,160*l.*; and there were also ninety general creditors whose claims amounted to 13,680*l.*

All outstanding debentures issued for cash had been paid off, and certain debentures issued within three months of the liquidation to secure existing debts, but for which no cash was paid, were admittedly void under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 212.

The only other claimants were F. T. Urch and his wife and their mortgagees, who claimed to be annuitants for the life of Urch in the following circumstances.

On the formation of the company Urch was employed as general manager and manager of the life department for seven years from January 1, 1910, at a salary of 1500*l.* and a commission under an agreement of November 6, 1909, adopted by the company after incorporation by an agreement of December 23, 1909. The agreement was terminable by the company on six months' notice and payment of two years' salary as liquidated damages. By an agreement of August 24, 1910, made between the company and Urch, Urch resigned the general managership and continued his managership of the life department only at a salary of 600*l.* and commission.

After the company had discontinued the industrial life assurance business negotiations took place with a view to Urch's retirement. He ultimately brought an action against the company for upwards of 3000*l.* damages for breaches of the employment agreements, non-payment of commission, and for breach of an alleged verbal agreement to pay him 250*l.* a year on retirement. This action was settled on the following terms (inter alia). "The defendant company to pay to the plaintiff an

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annuity at the rate of 240*l.* per annum from January 1, 1911, payable by equal monthly instalments during his life. The terms of the deed carrying out this arrangement to be similar to those contained in a deed which has already been engrossed for execution and which is initialled by the parties."

By this deed dated December 30, 1910, and made between the company and Urch, reciting that under the three employment agreements Urch was manager of the life department for seven years from January 1, 1910, at a salary of 600*l.* and commission and reciting that the business was being reorganized and as part of that reorganization Urch had agreed to retire from the post of manager of the life department and to deliver up the agreements to be cancelled in consideration of the company paying the annuity or sum of 240*l.* per annum as thereinafter mentioned, it was witnessed as follows:

1. Urch agreed to cancel and deliver up for cancelment the three agreements and released the company from all liability thereunder.

2. The company covenanted during Urch's life to pay his wife 240*l.* per annum by equal monthly instalments of 20*l.* on the last day of each calendar month, the first instalment to be paid on January 31, 1911, and in case his wife died in Urch's lifetime to pay the annuity or sum of 240*l.* by such monthly instalments to Urch.

3. In the event of his wife and/or Urch at any time desiring to sell the said annuity or sum of 240*l.* per annum the wife and/or Urch should in the first instance offer the same to the company for 1250*l.* cash, and if the company should not accept the same within twenty-one days of the offer the wife and/or Urch should be at liberty to sell the said annuity to any other person or company at such price and upon such terms as she and/or he should think fit.

4. Urch agreed that any life or other insurance business he was able to influence he would place with the company, and he would not place any such business with any other insurance company without first offering it to the company, and he would not act as agent for any insurance company other than the company, but nothing therein contained should operate to prevent him

from accepting any official position other than that of agent with any other insurance company.

Urch and his wife claimed that the annuity granted by this deed constituted a charge on the deposit fund in priority to any claims other than life assurance claims, and that it ought to be valued according to Rule A of Sched. VI. of the Assurance Companies Act, 1909. This was in fact the only annuity that the company had ever granted, though it had included life annuity tables in its prospectuses.

The petition was presented on December 2, 1913, and asked that the costs of the petitioners and of the Board of Trade and the respondents might be taxed and that the charges upon the deposit fund and the taxed costs might be ascertained and paid and that the balance of the fund might be paid to the liquidator for distribution as part of the assets of the company.

Astbury J. held inter alia that Urch's annuity was not an annuity and that he was not a policy holder within s. 30 (*b*) of the Assurance Companies Act, 1909, so as to give him a prior claim on the deposit fund.

Urch appealed.

There was no appeal on the other points decided by Astbury J.

Tomlin, K.C., and *Cababé*, for the appellant. This appeal is confined to the question whether the annuity granted to Urch is an annuity within the meaning of the Act of 1909 so as to give him a prior claim upon the deposited fund. It is submitted that the annuity deed is a policy within s. 30. It is not a superannuation allowance so as to be excluded by s. 29. Reading s. 30 with s. 3 there is a security for the policy holder upon the life assurance fund and the deposit is made part of the life assurance fund. Astbury J. held upon the construction of the Act that the only annuitants entitled to a charge upon the fund were annuitants who had contributed to the life assurance fund. It is submitted that that is wrong.

[SWINFEN EADY L.J. referred to s. 3, sub-s. 2. (1)]

(1) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 3, sub-s. 2: "A fund of any particular class shall be as absolutely the security of the policy holders of that class as though it belonged to a company

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Of course the annuity to be protected must be granted in respect of something connected with the life assurance business. Urch's commission was only upon the business which he managed, i.e., the life business. His claim was for breach of contract by that department, and the damages which he claimed could not have been paid out of the funds of any other department. What the Act does is to secure the policies and annuities. It makes no distinction. It is not relevant to consider what the consideration for the grant of the annuity was. It is not necessary that it should be granted in consideration of a cash contribution to the assurance fund. There is nothing in the Act which classifies annuities at all. Sect. 29 alone excludes superannuation allowances; but for that exclusion they would presumably have been entitled to a charge and the maxim expressio unius applies. There is nothing in the Act which precludes the granting of an annuity for any kind of consideration. Urch has a clear claim against the life fund. He agreed to give up payment of a sum of money which would have properly been charged upon that fund. There being a valid contract entered into in connection with a particular class of business the liability under that contract must fall upon the particular fund: s. 3, sub-ss. 1 and 2.

Micklem, K.C., and *G. M. T. Hildyard*, for the general creditors. Urch is not entitled to any charge on the deposit fund. He is not a policy holder. His annuity was granted under a special contract by way of compromise of an action for damages, and not in consideration of any payment to the life

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carrying on no other business than assurance business of that class, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class, and shall not be applied, directly or indirectly, for any purposes other than those of the class of business to which the fund is applicable."

Sect. 30: "Where a company carries on life assurance business this Act shall apply with respect to that business, subject to the following modifications:—

. . . . .

"(*b*) Where the company grant annuities upon human life, 'policy' shall include the instrument evidencing the contract to pay such an annuity, and 'policy holder' includes annuitant."

assurance fund. It was never contemplated that companies like this should pay their debts by granting annuities which would give the creditors a charge on the fund contributed by the policy holders. The company could not mortgage the fund. There are no provisions in the schedules to the Act which contemplate such a claim as is put forward by the appellant. Sect. 3 of the Act does not (when the life policy holders are satisfied) give any other class of creditors a charge on the fund. It is said that this is an annuity within the meaning of the Act. The mere fact that it is granted by a company which does life assurance business does not necessarily make it an annuity within the Act. In no case is the deposit fund a security except for the policy holders, and Urch is not entitled to come in either as a policy holder, or as a creditor in respect of life insurance business with a charge on the fund. Sects. 3 and 30 are the material sections, and they do not give general creditors any charge on the deposit fund. Urch was at most a creditor of the life assurance department, and a general creditor has no security, although he can bring an action and compromise it on the terms of getting an annuity. That does not put him in a better position than he occupied previously. The Act creates a fund for the policy holders inter se and does not affect creditors. The deposit is a statutory security and remains in Court, although if a general creditor were paid out of the deposit he could retain it, for he cannot be called upon to inquire where the money came from. The life deposit is part of the general assets of the company, but it cannot be touched till the life policy holders' claims have been satisfied: *In re Nelson & Co.* (1) The company's prospectus shewed that by "policy holders" purchasers of life policies in the ordinary way who had contributed to the funds were intended. Otherwise the granting of an annuity in order to pay a debt would be a fraud on the policy holders: *Joseph* v. *Law Integrity Insurance Co.* (2) As long as the company is a going concern it can use the life assurance funds for payment of debts although it cannot touch the deposit. This annuity was not issued to Urch in the course of the business of the company. In a winding-up a life assurance association is not entitled to a return of the

(1) (1906) 22 Times L. R. 406. (2) [1912] 2 Ch. 581.

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deposit till the policy holders are satisfied: *In re Popular Life Assurance Co.* (1); *In re Life and Health Assurance Association.* (2) Such a policy as this would not come within the Sixth Schedule to the Act. The Act refers to annuities in respect of which the company carries on business; and this company was not carrying on a business of issuing such policies as this. It is impossible to say what was the actual consideration given for it. So it could not come within the First or Sixth Schedules to the Act.

Stamp, for the liquidator.

Tomlin, K.C., in reply.

Cur. adv. vult.

May 4. COZENS-HARDY M.R. This company is being wound up under the supervision of the Court, and a petition was presented by the company and its liquidator for payment out of Court of the 20,000*l.* deposit paid into Court under the Life Assurance Companies Acts, 1870 to 1872. Several points were decided by Astbury J., as to which there is no appeal, and the only question for our decision is as to the rights of Mr. Urch, who claims to be entitled to a charge upon the deposit fund in respect of an annuity granted by the company. Astbury J. has rejected the claim and ordered the fund to be transferred to the liquidator.

It is admitted that the deposit of the 20,000*l.* was made in respect of life assurance business. To ascertain the legal position of this deposit fund it is necessary to refer to s. 3, sub-s. 2, of the Act of 1909, the language of which seems to me to present no difficulty. [His Lordship read the sub-section.] The result is that the deposit fund which is part of the life assurance fund is absolutely the security of the life policy holders and cannot be dealt with as free general assets of the company until after all such claims have been satisfied.

The only question is whether Mr. Urch is a life policy holder within the meaning of the Act. By s. 30 (*b*), where a company grant annuities upon human life, "policy" includes the instrument evidencing the contract to pay such amounts and "policy holder" includes annuitant. Mr. Urch holds a deed dated December 30, 1910, under the company's seal by which the company covenanted

(1) [1909] 1 Ch. 80. (2) [1910] 1 Ch. 458.

to pay during his life an annuity of 240*l*. The validity of the deed is not challenged. But it is contended that as the annuity was not granted for a cash consideration it is not such an annuity as was contemplated by, or is entitled to, the benefits of the Act of 1909. The transaction which led to the grant of the annuity may be shortly stated. Urch was manager of the life department for a period of seven years from January 1, 1910, at a salary of 600*l*. a year together with a commission of 5 per cent. of the first year's premiums on new business. Disputes arose, and he alleged breaches of contract on the part of the company. He issued a writ on November 16, 1910, and delivered a statement of claim on December 19. The action was settled upon terms one of which was that the company should grant him a life annuity of 240*l*. and another that the plaintiff should release the company from all claims and liability. There was abundant consideration for the grant of the annuity, and it was not ultra vires. The consideration is truly recited in the deed.

Astbury J. considered that the annuity was not granted in the ordinary course of business, i.e., in consideration of a payment to the life assurance fund, and therefore was not within the Act, but with great respect I am unable to agree with this view. It is not consistent with the decision in *In re Nelson & Co.* (1), and it involves the insertion in s. 30 (*b*) of the words "for a cash consideration only." For this I think there is no justification. This annuity was granted for valuable consideration, and the nature of that consideration is not important.

A point was made upon the rule for valuing an annuity in the Sixth Schedule, but for reasons stated in the course of the argument I am unable to attach any importance to it. The sum to be paid for an annuity of 240*l*. to a male of Mr. Urch's age can be ascertained by reference to the tables, although in fact no tables were used.

I may add that, as the company's business came to an end on the winding-up, it is not necessary to consider what is the position of the principal or interest of the deposit fund while business is being carried on.

The appeal must be allowed.

(1) 22 Times L. R. 406.

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SWINFEN EADY L.J. The question raised by this appeal is whether the life assurance deposit of the insolvent company should be paid to the liquidator without first providing for the payment to Frank Urch, his wife and mortgagees, of the value of an annuity granted by the company on the life of the said Frank Urch. There is no dispute that the deposit is to be deemed part of the life assurance fund of the company, and that under s. 3, sub-s. 2, of the Assurance Companies Act, 1909, the life assurance fund is as absolutely the security of the holders of the policies in respect of life insurance as though it belonged to a company carrying on no other business than life assurance business. Again, life assurance business is defined by s. 1 (*a*) as the issue of, or the undertaking of liability under, policies of assurance upon human life, or the granting of annuities upon human life. And again, it is not disputed that by the deed of December 30, 1910, the company granted an annuity of 240*l.* per annum for the life of Frank Urch.

By s. 30 of the Act of 1909 it is provided that where a company carries on life assurance business the Act shall apply with respect to that business, subject to certain modifications which follow, including (*b*): "Where the company grant annuities upon human life, 'policy' shall include the instrument evidencing the contract to pay such an annuity, and 'policy holder' includes annuitant."

The dispute is whether the annuity granted to Urch and the deed evidencing the contract to pay it are respectively an "annuity" and a "policy" within the meaning of the Act.

Under an agreement of August 24, 1910, between the company and Urch, modifying previous agreements, Urch was to retain only the duties of managing the life department of the company at a salary of 600*l.* per annum and a commission of 5 per cent. on the first year's premiums on new business—that means new life assurance business. This arrangement took effect as from May 1, 1910, and was for the residue of a term of seven years from January 1, 1910. Disputes arose between Urch and the company, legal proceedings followed, and ultimately these disputes were ended by the parties entering into the deed whereby the annuity in question was granted.

The learned judge below decided that this annuity is not an annuity within the meaning of the Act, and has not the security of the life assurance fund, as it was not granted for a consideration which could be carried to the credit of and form part of the life annuity fund; he held that the persons entitled to be regarded as policy holders within the meaning of the Act ought to be confined to those who have made the appropriate subscriptions to the life annuity fund of the company.

I am unable to adopt this view, as there is not any provision in the statute which justifies restricting in this manner the class of persons entitled to be regarded as policy holders. This company carried on life assurance business, and in its prospectus stated that it granted life annuities, payable quarterly in advance, and quoted life annuity rates on both male and female lives, and therefore the definitions contained in s. 30 (*a*) and (*b*) apply. Under these circumstances I am of opinion that an annuity granted in good faith and for value is entitled to the security of the life assurance fund, so long as the transaction does not infringe the provisions of s. 3, sub-s. 2. The learned judge below stated that unless annuities were confined to those who made the appropriate subscriptions to the life assurance fund, an insurance company could largely evade its obligations under the Act by granting annuities to creditors under fire or accident policies. But this objection is not well founded. Sect. 3, sub-s. 2, provides that a fund of any particular class shall not be applied directly or indirectly for any purposes other than those of the class of business to which the fund is applicable; and therefore no annuity granted in respect of any fire or accident loss could become a valid claim against the life assurance fund. But the annuity granted to Urch was in respect of his claim to damages for breach of a contract relating solely to the life department, and providing for such a claim is not within the mischief which it is the object of s. 3, sub-s. 2, to prevent.

In my opinion Frank Urch and the persons who claim through him the annuity in question are entitled to have their claim as life policy holders satisfied out of the deposit before the balance of the fund is paid to the liquidator as part of the general assets of the company.

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PICKFORD L.J. In this case Mr. Urch claims to be paid as an annuitant out of the deposit made by the company under the Assurance Companies Act as a security for life policy holders before the balance of it is handed over to the liquidator for the benefit of the general creditors of the company. Mr. Urch was at one time general manager and also manager of the life department. Subsequently he gave up the position of general manager and became manager of the life department at a salary of 600*l.* a year and commission. This commission was upon the business of the life department only. Disputes afterwards arose between Mr. Urch and the company, and eventually he brought an action against them claiming damages for breach of the contract of employment and also for breach of an alleged agreement to give him an annuity of 250*l.* This action was settled by the company agreeing to give him an annuity of 240*l.*, and a deed was executed by which the company agreed to pay to Mrs. Urch during their joint lives and to Mr. Urch after her death a yearly sum of 240*l.* It also contained provisions giving to this company a right of pre-emption in case of Mr. and Mrs. Urch wishing to sell the annuity, and also a provision that he was to influence business to the company.

The company was afterwards wound up, and Mr. Urch claims as an annuitant under this deed.

It was contended on his behalf that he is the holder of an annuity created by a policy within the provisions of s. 30 of the Act, and that therefore he is entitled to the same rights as the other policy holders. On the other hand it is contended that the deed given in settlement of the dispute was not a policy issued in the ordinary course of the company's business, that s. 30 and indeed the whole of the Act only applies to policies so issued in respect of which payments are made to the life assurance fund, and that this deed being a settlement of a claim for damages which would only be recoverable out of the general assets of the company only creates a claim upon such assets and not upon the deposit. In support of this argument reference was also made to the schedules of the Act which it is said shew that only policies given in respect of a payment to the company were contemplated.

Astbury J. accepted this argument and seemed to be much impressed by the contention that if the principle of Mr. Urch's claim were admitted the company would be able by granting annuities to claimants in respect of fire and accident policies to apply the life assurance fund to fire and accident claims. If this were the result I should think it a strong argument against the appellant's contention. But I do not think this result follows. The granting of such annuities is directly forbidden by s. 3, sub-s. 2, because to grant them would be indirectly to apply the life assurance funds for purposes other than those of the class of business to which the fund is applicable. The deed given to the appellant seems to me to be exactly within the definitions of the interpretation section 30 (*a*) and (*b*), and the deed is therefore a policy and was given bona fide and for good consideration. No doubt the issue of policies for money payments is the usual course of business, but I cannot see that a policy issued for other good consideration is not entitled to the same rights, provided that the consideration is not one which brings it within the provisions of s. 3, sub-s. 2.

Whether an annuity given in settlement of a debt arising out of the general business of the company would be contrary to s. 3 it is not necessary to consider, as in this case the claim in respect of which it was given arose entirely out of the business of the life department.

I think, therefore, that the appellant is entitled to be paid out of the deposit. To hold otherwise it would in my opinion be necessary to add qualifying words, such as "when carried on in the ordinary course of business for cash considerations," to the words "such business" in s. 30, and I can see no reason for doing so.

I think the appeal should be allowed.

Appeal allowed.

Solicitors: *Ellis, Bickersteth, Aglionby & Hazel; Rawle, Johnstone & Co., for Cooper & Goodger, Newcastle-upon-Tyne; Foss, Bilbrough, Plaskitt & Co.*

H. C. R.

Distinguished. GIBSON *v.* SOUTH AMERICAN STORES, LTD. [1949] 2 All E.R. 18.

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March 25, 26.

In re DRUMMOND.

ASHWORTH *v.* DRUMMOND.

[1913 D. 1711.]

Will—Construction—Charitable Trust—Gift for Contribution to Workpeople's Holiday—Gift to Club—Purposes to be determined by Committee—Validity.

By his will the testator bequeathed certain shares to his trustees upon trust to pay the income therefrom to the directors of a commercial company "for the purposes of contribution to the holiday expenses of the workpeople employed in the spinning department of the said company in such manner as a majority of the directors should in their absolute discretion think fit," the directors having power to "divide the same equally or unequally between such workpeople." And after other bequests the testator devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion and to hold the proceeds upon trust for the Old Bradfordians' Club, London (being a club for old boys of the Bradford Grammar School), to be utilized as the committee of the club should think best in the interests of the club or school.

In the spinning department of the company upwards of 500 females were employed at an average weekly wage of 15*s.* and twelve workpeople and overseers at 36*s.* to 37*s.* a week. There was also a holiday expenses fund to which the operatives and workpeople could, at their option, subscribe, and it was supplemented by contributions from the company:—

Held, as to the first gift, that the workpeople in question could not properly be regarded as poor people, within the statute of Elizabeth; and, further, that the trust was not one for general public purposes, but a trust for private individuals, and not being charitable was void as infringing the rule against perpetuities.

But *held* that the residuary gift did not tend to a perpetuity and was valid.

By his will, dated November 24, 1911, James Drummond, of Brook Lodge, Ilkley, in the county of York, a director of James Drummond & Sons, Limited, after appointing the three plaintiffs and one other gentleman executors and trustees, and making certain devises and bequests, bequeathed to his trustees 1700 of his preference shares of 10*l.* each in James Drummond & Sons, Limited, upon trust, as to 500 thereof, to pay the income to arise therefrom to the directors of James Drummond & Sons, Limited,

for the purposes of contribution to the holiday expenses of the workpeople employed in the spinning department of the said company, in such manner as a majority of the directors should, in their absolute discretion, think fit, and the testator declared that the directors might divide the same equally or unequally between such workpeople, or some of them only, as they should in their absolute discretion think fit, and if the said company should at any time be wound up, then the testator directed the trustees to pay the money received by them in respect of the 500 preference shares to the governors of the Bradford Grammar School, upon trust as therein mentioned. The testator then dealt with the remaining 1200 preference shares, and, after certain further bequests, devised and bequeathed all his real and personal estate not thereby otherwise disposed of unto his trustees upon trust for sale and conversion, and, subject to the payments therein mentioned, to stand possessed of the residue of the moneys produced by such sale and conversion upon trust for the Old Bradfordians' Club, London (being a club instituted by Bradford Grammar School old boys), the receipt of the treasurer for the time being of the club to be a sufficient discharge to his trustees.

By a codicil to his will, dated December 2, 1911, the testator, after reciting, inter alia, the residuary devise and bequest, thereby declared that he desired that the said moneys should be utilized by the club for such purpose as the committee for the time being might determine, the object and intent of the bequest being to benefit old boys of the Bradford Grammar School residing in London or members of the club, and to enable the committee, if possible, to acquire premises to be used as a club-house for the use of the members, being old boys of the Bradford Grammar School, with power to the committee to make rules and regulations as to residence in or use of the same, and further that it was the object of the bequest that the moneys should be utilized in founding scholarships or otherwise in such manner as the committee for the time being should think best in the interests of the club, or the school.

The testator died on December 6, 1911, and his will with the codicil thereto was duly proved by the plaintiffs as the executors

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thereof, the other executor having renounced probate. The company of James Drummond & Sons, Limited, continued to carry on business as worsted spinners and manufacturers, and the defendants John Drummond and James Douglas Drummond were the sole present directors thereof. John Drummond was also heir-at-law of the testator. Another defendant, Arthur Gill, was an overlooker at the spinning mill, and also one of the workpeople employed therein. The other defendants were the governors of the Bradford Grammar School (registered), the Old Bradfordians' Club (London), Limited, and the Attorney-General.

Questions having arisen as to the true construction of the will and codicil in reference to the trusts declared of the 500 preference shares in favour of the workpeople employed in the spinning department of the business, and the Bradford Grammar School, and also as to the effect of the gift of the residuary real and personal estate, an originating summons was taken out on December 3, 1913, by the trustees of the will for the determination of the questions. It was agreed between the parties that in the spinning department of the company there were from 400 to 500 workpeople, chiefly girls, whose average weekly wages were 15*s.*, and some twelve overlookers who also worked in the department and whose wages were from 36*s.* to 37*s.* a week. For some years past there had been a holiday fund to which the operatives could contribute. The Old Bradfordians' Club was founded in 1899 to encourage social intercourse amongst the old boys of the Grammar School and had been managed by a committee elected by members of the club. On January 3, 1913, the defendant company the Old Bradfordians' Club (London), Limited, was registered under the Companies Act, 1908, to take over the assets and property of the club, and the objects were precisely similar, the management of the club being vested in the committee.

Andrewes-Uthwatt, for the trustees of the will.

Clayton, K.C., and *Howard Wright*, for John Drummond, the heir-at-law of the testator. The first specific bequest tends to a perpetuity. It is not charitable, because poverty is not an essential element in the recipients of the benefits of the bequest.

In order to constitute a good charitable bequest, it must be for poor people. These operatives are not paupers, and the overlookers earn a substantial wage per week: *In re Clark's Trust* (1); *Cunnack* v. *Edwards* (2); *Braithwaite* v. *Attorney-General.* (3)

The present gift is philanthropic or benevolent, but not charitable, and is therefore bad: *In re Macduff* (4); *Attorney-General* v. *Duke of Northumberland* (5); *In re Gassiot.* (6) Further, the gift here is really for the benefit of individuals, and not for a particular section of the public within a particular locality. If the first gift is held to be bad, the gift to the Bradford Grammar School falls with it.

J. E. Harman, for the directors of James Drummond & Sons, Limited. This is a good charitable gift for the relief of poor people: Tudor on Charities and Mortmain, 4th ed. p. 46; *Commissioners for Special Purposes of the Income Tax* v. *Pemsel* (7); *In re Dudgeon* (8); *In re Elliott.* (9) There is sufficient in the present case to enable the Court to infer poverty although the word is not expressly mentioned in the gift. Workpeople earning only a wage of 15*s.* a week are poor people.

The gift can also be supported on the ground that it is for the benefit of a particular section of the public to enable them to obtain health and recreation. A gift to be applied for the benefit of a named institute has been held a good charitable bequest for the general benefit of the inhabitants of the village in which it was situated: *In re Mann.* (10)

Dighton Pollock, for the governors of Bradford Grammar School. This is a gift for a limited class of persons at a particular locality, and is good: *In re Gosling* (11), where a gift to pension off old and worn out clerks of a firm was held a good charitable trust. The gift in the present case enables workpeople who could not afford to contribute to a holiday fund to have a holiday. These operatives are poor, and poverty is

(1) (1875) 1 Ch. D. 497.
(2) [1896] 2 Ch. 679.
(3) [1909] 1 Ch. 510.
(4) [1896] 2 Ch. 451.
(5) (1877) 7 Ch. D. 745.
(6) (1901) 70 L. J. (Ch.) 242.
(7) [1891] A. C. 531, 583.
(8) (1896) 74 L. T. 613.
(9) (1910) 102 L. T. 528.
(10) [1903] 1 Ch. 232, 235.
(11) (1900) 48 W. R. 300.

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implied in the will. [He also referred to the cases of *Attorney-General* v. *Comber* (1); *Thompson* v. *Corby*. (2)]

Austen-Cartmell, for the Attorney-General. This is a gift for people who can properly be described as poor. The directors have also a discretion to be exercised in the contribution and may divide it equally or unequally. But, apart from the question of poverty, this is a gift for a public purpose, for the benefit of a particular class of the public employed in a particular business; and that is good according to the authorities: *Goodman* v. *Saltash Corporation* (3); *In re Wall* (4); *In re Christchurch Inclosure Act*. (5) In the last case a public charitable trust was held to be well created for the benefit of the occupiers of a few small cottages within the parish of Christchurch, Hampshire. In the present case there is a substantial class of some 500 operatives engaged in a great industrial undertaking, who claim to be benefited by this gift. It is, thirdly, a gift for the benefit of the public at large, as it tends to preserve the welfare of persons who require help. In the case of *In re Good* (6) a gift to maintain a library and to purchase plate for the officers' mess of a regiment was held to be for a public general purpose and a good charitable bequest.

Clayton, K.C., in reply. The third ground on which this gift is put, namely, of the benefit of the public at large, cannot possibly be supported: *In re Nottage* (7), where a gift for the encouragement of a mere sport, although beneficial to the public, was held not to be charitable. On the second point, that it benefits a particular class of the public, we contend that the benefits of such a gift must be open to the public; here it is only for the workpeople of this particular company. The gift is not for a section of the public, but for private individuals, and is bad on all three points.

EVE J. The admitted facts, in addition to those which are in evidence, upon which my judgment is founded, are these: There

(1) (1824) 2 S. & S. 93.
(2) (1860) 27 Beav. 649.
(3) (1882) 7 App. Cas. 633, 642.
(4) (1889) 42 Ch. D. 510.
(5) (1888) 38 Ch. D. 520, 530.
(6) [1905] 2 Ch. 60.
(7) [1895] 2 Ch. 649.

are employed in the spinning department of James Drummond & Sons, Limited, some 400 to 500 females at an average weekly wage not exceeding 15*s*., and some twelve workpeople who, in addition to doing work in the spinning department, also act as overlookers of the female operatives, their wages on the average amounting to 36*s*. or 37*s*. a week; further, there is, and has been for many years past, a fund to which the operatives and workpeople can, at their option, subscribe, which is utilized for the purpose of meeting the holiday expenses of the contributors, and the contributions made by the operatives and workpeople to that fund have in the past been supplemented by contributions from the company's funds. Those facts have been stated and admitted, and my judgment proceeds upon that footing. That being the position of affairs, the question I have to determine is whether a bequest by the testator in the following terms is a good charitable bequest: "I bequeath to my trustees one thousand seven hundred of my preference shares of ten pounds each in James Drummond & Sons, Limited, upon trust as to five hundred thereof, to pay the income to arise therefrom to the directors of James Drummond & Sons, Limited, for the purposes of contribution to the holiday expenses of the workpeople employed in the spinning department of James Drummond & Sons, Limited, in such manner as a majority of the said directors shall in their absolute discretion think fit, and I declare that the said directors may divide the same equally or unequally between such workpeople, or some of them only, as they shall in their absolute discretion think fit." It has been argued first that although there is nothing expressed in that bequest as to the poverty of the recipient, or as to his or her inability to take a holiday without the aid of the contribution thereby contemplated, I ought to infer from the form of the bequest that there was thereby imposed upon the directors a trust so to exercise their discretion as to make contributions only in those cases in which the operative would have been unable to take a holiday, or to contribute his or her quota to the holiday expenses fund without the assistance of the contribution, and secondly that the whole class of workpeople employed at a weekly wage not exceeding 15*s*. is a class of persons who may properly be described as poor people

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within the meaning of the statute of Elizabeth. I do not think I can accede to either of these views. I think that what the testator really contemplated was the provision of a fund by the income of which the contributions theretofore made by the company should be continued, and that there is nothing in this bequest, or in the terms in which the discretion is given to the directors, which imposes upon them the obligation of inquiring into the ability of the participants to provide themselves with a holiday without the assistance, or limits their powers of contribution to cases where no holiday would be possible without such contribution. Nor can I judicially hold that a large body of workpeople working at what does indeed seem to be a very small wage can properly be regarded as being in such a condition of poverty as to be poor people within the statute. Then it is said, even if that be so, the gift may still be a good charitable gift in that it is a gift for general public purposes, to be applied for the benefit of a particular section of the public, and is within the principles underlying that class of case in which a good charitable trust has been held to be created, not for all the inhabitants of any particular town, village, or borough, but for a particular, and very often a small, section of those inhabitants, such, for example, as a trust for the benefit of those possessing certain qualifications (freemen of the borough), or residing in certain tenements, or constituting a particular class, such as widows, or aged persons. I confess if I could have seen my way to uphold the gift on that line of authority I should have been pleased to do so, because, undoubtedly, the dividing line is a very fine one. Mr. Austen-Cartmell argues that the trust is really a trust for public purposes, the securing of a holiday for a large body of the inhabitants of this particular city, and the benefiting thereby of the general health of the community; that it only differs from the cases on which he relied in that it fixes the qualification, not with reference to any particular place of residence, or to the possession of any particular franchise, but with reference to employment in a particular business, and a particular department in that business, and he contends that, if a public trust can be created for the occupiers for the time being of a few small cottages in a Hampshire village, a similar trust

can certainly be created for the large aggregation of persons constituting for the time being the employees in some of these great industrial undertakings. I think the answer to that argument has been supplied by Mr. Clayton in the course of his reply. This is not a trust for general public purposes; it is a trust for private individuals, a fluctuating body of private individuals it is true, but still private individuals, and that being so it is outside the line of authorities cited, and not being for public purposes it is not charitable, but is void as infringing the rule against perpetuities. It is not disputed that on this finding the alternative gift to the grammar school must also fall.

G. M.

The question of the validity of the residuary gift in favour of the Old Bradfordians' Club was then argued.

Maugham, K.C., and *C. Hartree*, for the Old Bradfordians' Club.

Clayton, K.C., and *Howard Wright*, for the heir-at-law and next of kin of the testator.

The following authorities were referred to in the course of the arguments:—*Thomson* v. *Shakespeare* (1); *Carne* v. *Long* (2); *In re Dutton* (3); *In re Wilkinson's Trusts* (4); *In re Clarke* (5); *Cocks* v. *Manners* (6); *In re Amos* (7); *In re Delaney* (8); *Langham* v. *Peterson* (9); *In re Smith* (10); *Hancock* v. *Watson*. (11)

EVE J. said that he could not hold, as the result of the will and codicil together, that the residuary gift of realty and personalty for the Old Bradfordians' Club was a gift to the members individually. There was, in his opinion, a trust, but there was abundant authority for holding that it was not such a trust as would render the legacy void as tending to a perpetuity: *In re Clarke*. (5) The legacy was not subject to any trust which would

(1) (1859) John. 612; affirmed (1860) 1 D. F. & J. 399.
(2) (1860) 2 D. F. & J. 75.
(3) (1878) 4 Ex. D. 54.
(4) (1887) 19 L. R. Ir. 531.
(5) [1901] 2 Ch. 110.
(6) (1871) L. R. 12 Eq. 574.
(7) [1891] 3 Ch. 159.
(8) [1902] 2 Ch. 642.
(9) (1903) 87 L. T. 744.
(10) [1914] 1 Ch. 937.
(11) [1902] A. C. 14.

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prevent the committee of the club from spending it in any manner they might decide for the benefit of the class intended. In his opinion, therefore, there was a valid gift to the club for such purposes as the committee should determine for the benefit of the old boys or members of the club.

Solicitors: *Blundell, Gordon & Co., for Gordon, Hunter & Duncan, Bradford; Kingsford, Dorman & Co., for Vint, Hill & Killick, Bradford; Speechly, Mumford & Co., for Mumford, Johnson & Co., Bradford; J. Moverley Sharp; the Solicitor to the Treasury.*

A. L.

SARGANT J.
1914
April 22, 23.

KEEN *v.* PRICE.

[1908 K. 1012.]

Partnership—Action for Account—Bookmaking and Betting Business—Capital not absorbed in Betting—Gaming Act, 1892 (55 & 56 *Vict. c.* 9), *s.* 1.

An action will lie by one partner in a bookmakers' and betting business against the other for an account of the partnership dealings, but the order for the account will leave it open to the defendant to object to repaying anything which represents profits. The plaintiff is entitled to recover any advances made by him which have not been lost in betting.

Thomas v. *Dey* (1908) 24 Times L. R. 272 not followed.

The decision of Chitty J. in *Thwaites* v. *Coulthwaite* [1896] 1 Ch. 496, although correct on the general law, cannot be regarded as a decision on s. 1 of the Gaming Act, 1892.

THE plaintiff sued the defendant for an account of the partnership dealings between them, under an agreement for partnership dated November 12, 1907, which partnership had been dissolved by mutual consent. The partnership business was that of bookmakers and commission agents, and the capital of the business was 1000*l.*, which was contributed by the partners in equal shares.

The defendant was the only person who was authorized to draw on the partnership banking account.

The defendant had delivered an account which, if correct, shewed that not only had the whole capital been lost, but that the plaintiff was indebted to the defendant in a small amount.

The plaintiff said that the taking of an account would shew that part of the capital contributed by him was still intact, and he asked that the usual order might be made for an account of the partnership dealings and transactions.

Martelli, K.C., and *Hodge*, for the plaintiff. There is no doubt that the business was that of turf agents and bookmakers, and that it involved the making of bets; but that does not prevent the plaintiff from being entitled to an order for the ordinary account of the partnership dealings. Betting is not in itself illegal. In *Thwaites* v. *Coulthwaite* (1) Chitty J. said: "A man may make a single bet or many bets; he may habitually bet; he may carry on a betting or bookmaker's business within this statute"—the Gaming Act, 1845—"provided the business as carried on by him does not fall within the prohibition of the Betting Act, 1853." And in that case Chitty J. ordered an account of the profits of the partnership, and pointed out how betting might be legally carried on.

The plaintiff is not asking for an account of profits, but of dealings with the assets, including the capital contributed by him. The defendant is clearly bound to account for what he has received from the plaintiff: *Harvey* v. *Hart* (2); *De Mattos* v. *Benjamin*. (3)

By s. 1 of the Gaming Act, 1892 (55 & 56 Vict. c. 9), it is provided that "any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by" the Gaming Act, 1845, "or to pay any sum of money by way of commission, fee, reward or otherwise in respect of any such contract, or of any services in relation thereto or in connexion therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money." That was passed to alter the law as laid down by the Court of Appeal in *Read* v. *Anderson* (4), and under it it was held by the Court of Appeal in *Saffery* v. *Mayer* (5) that where money has been advanced by one person

(1) [1896] 1 Ch. 496, 499.
(2) [1894] W. N. 72.
(3) (1894) 63 L. J. (Q.B.) 248.
(4) (1884) 13 Q. B. D. 779.
(5) [1901] 1 K. B. 11.

SARGANT J. to another for the purpose of making bets on their joint account.

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and the money is lost on such bets, the person advancing the money cannot maintain an action for half the amount lost. *Thwaites* v. *Coulthwaite* (1) is there referred to by Collins L.J. without any expression of disapproval; and in *Hyams* v. *Stuart King* (2) Farwell L.J. said he was not prepared to overrule it.

[SARGANT J. Suppose money is advanced in order that it may be applied for an illegal purpose, and it is so applied, can it be subsequently recovered by the person advancing it?

Frank Evans, amicus curiæ, referred to *Taylor* v. *Chester*. (3)]

In such a case probably the money cannot be recovered, but in *Saffery* v. *Mayer* (4) A. L. Smith M.R. refers to the stakeholders' cases of *O'Sullivan* v. *Thomas* (5) and *Burge* v. *Ashley and Smith* (6), in which it was held that the person depositing the money might recover it from the stakeholder before he had parted with it to the winner of the race or the like to abide the result of which the money had been deposited.

The defendant may rely on *Thomas* v. *Dey* (7), in which Darling J. decided that the Court would not entertain an action for an account by one partner in a betting business against the other partner, and referred to the case of the highwaymen (8); but in *Brockman* v. *Mather* (9) Avory J. said that *Thomas* v. *Dey* (7) was decided on the broad principle that a betting business could not be recognized as legal in a Court of justice, and that that case was decided without reference to *Thwaites* v. *Coulthwaite*. (1)

J. W. Manning, for the defendant. *Saffery* v. *Mayer* (10) is in my favour. There the Court held that money advanced to be used for betting could not be recovered.

[SARGANT J. The decision would be an authority in your favour if the plaintiff in the present action were seeking to recover capital of his which had been lost in betting, but he is

(1) [1896] 1 Ch. 496.
(2) [1908] 2 K. B. 696, 725.
(3) (1869) L. R. 4 Q. B. 309.
(4) [1901] 1 K. B. 11, 14.
(5) [1895] 1 Q. B. 698.
(6) [1900] 1 Q. B. 744.
(7) 24 Times L. R. 272.
(8) *Everet* v. *Williams*, Law Quarterly Review, vol. ix. p. 197; Lindley on Partnership, 8th ed. p. 113, note (*q*).
(9) (1913) 29 Times L. R. 276.
(10) [1901] 1 K. B. 11.

only seeking to recover what has not been absorbed in betting transactions.]

The words of the Act are very wide, and the principle seems to be that no action will lie to recover any money in respect of such a business as this.

[SARGANT J. Suppose the plaintiff had repented and asked for his money back before any betting had taken place, could he not have recovered it all?]

It is perhaps difficult to say that he could not, having regard to the cases as to stakeholders; but it may be contended that the partnership contract contemplates betting and comes within the purview of the Act of 1892. *In re Cronmire* (1) seems to be to some extent in the plaintiff's favour.

Martelli, K.C., in reply. We only ask for an account of all dealings as between the partners, without prejudice to any question as to whether the defendant is liable to pay the plaintiff any share of profits.

SARGANT J. (after stating the facts). There are many cases dealing with questions like that raised before me in the present action. The first important case is that of *Thwaites* v. *Coulthwaite* (2), in which Chitty J. held that an action would lie by one partner in a bookmakers' and betting business against the other partner for an account of the profits of the partnership. Curiously enough, in that case the Gaming Act, 1892, was not referred to, and, although the decision is a good one on the general law, it cannot be regarded as a decision on the Act of 1892. In that case Chitty J. directed an account of the profits to be taken, and said that betting was not per se illegal, and that there was no reason for not ordering an ordinary partnership account to be taken. A somewhat similar case was *Saffery* v. *Mayer* (3), but in that case, as pointed out by Collins and Stirling L.JJ., the plaintiff was seeking to recover half the losses made by the partnership in betting transactions. In that state of affairs the Court of Appeal, while not overruling *Thwaites* v. *Coulthwaite* (2), held that the case was within the Gaming Act, 1892, and that

(1) [1898] 2 Q. B. 383. (2) [1896] 1 Ch. 496.
(3) [1901] 1 K. B. 11.

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the action could not be maintained. Some remarks were made by Darling J. in *Thomas* v. *Dey* (1), an action for an account by one partner in a betting business against the other partner, in which the learned judge likened the case to that in which one highwayman sued his brother robber for an account, and in which the plaintiff's counsel was ordered to pay the costs; but the decision of Darling J. has been corrected by Avory J. in *Brookman* v. *Mather*. (2) In that case the partnership in a betting business had been dissolved by consent, and on an account being taken it was agreed that 100*l*. was due to the plaintiff, and for this amount the defendant gave the plaintiff his I.O.U., the amount being a rough estimate of what was due to the plaintiff in respect of his capital, and it was held that the amount could be well sued for.

That case is very like the present case. Assuming the plaintiff, after advancing his 500*l*. and before any of it had been applied for betting purposes, had repented and asked for his money back, the Gaming Act, 1892, would not, I think, have prevented the plaintiff from recovering it. Such a case seems to me to be analogous to the cases with reference to the recovery of money deposited by the plaintiff with the defendant to abide the event of a wager on such an event as the result of a race or a boxing match. Such an action is founded on the fact that the money advanced by the plaintiff to abide the result has not been actually paid over to the winner before it is demanded back, and it has been held that the money deposited is not money paid under or in respect of a wagering contract within the meaning of the Act of 1892, and that the plaintiff is entitled to recover his money. If that analogy is correct, it seems that the plaintiff in this case can recover any balance of his capital which has not been applied in payment of bets. Accordingly, although the taking of the account may result in shewing that part of the plaintiff's capital has been applied in paying bets, I think I ought to order an account of the partnership dealings, leaving it open to the defendant to object to any particular items, and to object to repaying anything which represents profits. On the other hand my judgment is intended to preclude the defendant

(1) 24 Times L. R. 272. (2) 29 Times L. R. 276.

from saying that he is not to repay the plaintiff his share of any capital which has not been lost in the business. The costs of the proceedings generally, and not only the costs of taking the account, will be reserved.

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Solicitor for plaintiff: *R. Chapman.*

Solicitor for defendant: *H. W. Clarkson, for F. W. A. Cushman, Brighton.*

F. E.

In re CARL LINDSTROEM AKTIENGESELLSCHAFT'S TRADE MARK.

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April 30.

[1914 C. 485.]

Trade Mark—Invented Word—"Parlograph"—Word sufficiently referring to Origin of Goods—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 3, 9.

A word which is an "invented word" within the meaning of head (3.) of s. 9 of the Trade Marks Act, 1905, may be registered as a trade mark, although it has "direct reference to the character or quality of the goods" within head (4.) of that section—the law in this respect being the same as that laid down in *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs, and Trade Marks* [1898] A. C. 571, with reference to corresponding provisions of the Patents, Designs, and Trade Marks Acts, 1883 and 1888.

The word "Parlograph" is capable of registration as a trade mark under class 8 in respect of sound-recording and reproducing machines and parts and accessories thereof.

A German company, which had already registered the word "Parlograph" as its trade mark in several foreign countries, in connection with sound-recording and reproducing machines and the like, applied for registration of the word as its trade mark in England. A pamphlet was in evidence (issued by an English company which was the sole agent in the United Kingdom for sale of the German company's goods) which described, under the name "Parlograph," a sound-recording machine thereby offered for sale in the United Kingdom:—

Held, that the word sufficiently indicated that it was to be used in connection with articles produced by the applicants to come within the definition of "trade mark" in s. 3 of the Act of 1905.

In re Gramophone Co.'s Application [1910] 2 Ch. 423 distinguished.

IN this case a company called Carl Lindstroem Aktiengesellschaft, of Berlin, applied for registration as a trade mark of the

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word "Parlograph" in class 8, in respect of sound-recording and reproducing machines and apparatus included in class 8 and parts and accessories thereof included in class 8.

The Registrar of Trade Marks refused the application, stating his reason for doing so as follows: "It seems to me that this word is merely a prefix, 'Parlo,' derived from the French word 'parler,' to speak, with a known suffix, 'graph,' which occurs in many English words, and, according to the Standard Dictionary, denotes 'that which writes or that which is written, and generally in compounds of Greek origin, as telegraph, photograph, &c.' The prefix 'Parlo' is akin to words like 'parley' and 'parlance' and to the root of 'Parliament.' If that be so, the word applied for is not invented, and has 'direct reference to the character or quality of the goods.' This contention is corroborated by some information contained in a pamphlet left at the hearing. In that pamphlet it is stated that the 'Parlograph' is a machine to stand by your desk, which records everything spoken into it, and will repeat same as many times as may be necessary into the ear of a typist or stenographer at any desired speed. From the pamphlet referred to above it also appears that the word is the name of a machine that is a patented article. For these reasons the office has no option but to refuse the application."

The word "Parlograph" was already the registered trade mark of the applicants in Germany, Austria-Hungary, Italy, Rumania, Russia, Holland, Norway, and the Argentine Republic.

The word was used as a mark with reference to a great variety of goods (not only with reference to the machine referred to in the pamphlet), including talking machines, records for such machines, sound or tune records, sound boxes, needles or stylus, winding machines, turntables, sound increasers, boxes or albums, cases for records, cases and boxes for sound boxes or other apparatus, furniture for keeping sound boxes or other apparatus, furniture as pedestals for apparatus, phonographs, dictating machines, motors, shaving machines, and typewriters and parts.

The applicants appealed to the Board of Trade, which referred the appeal to the Court under s. 59 of the Trade Marks Act,

1905, and, under r. 125 of the Trade Marks Rules, 1906, directed the applicants to apply by motion to the Chancery Division to hear and determine the appeal.

The applicants accordingly served notice of motion on the registrar for the reversal of his decision, and that he might be directed to proceed with the application for registration.

The pamphlet, after describing the parlograph dictating machine, gave a form of order for it, to be addressed to "The British Parlograph Co., 77, City Road, E.C."

There was an affidavit by a Mr. Balcombe, described as "of 77, City Road in the county of London, manager," that he was the manager of O. Buhl, Limited, whose registered office was at 77, City Road, which was a company duly incorporated under the Companies (Consolidation) Act, 1908, and carried on business (inter alia) as sole agent in the United Kingdom for the sale of various goods manufactured by the applicants, a company incorporated under the laws of the German Empire, which carried on business as manufacturers of various goods.

A. J. Walter, K.C., and *L. B. Sebastian*, for the appellants. Sect. 3 of the Trade Marks Act, 1905, says that a "mark" is to include a "word, letter, numeral or any combination thereof"; that a "trade mark" shall "mean a mark used or proposed to be used upon or in connexion with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale"; and that a "registrable trade mark" shall "mean a trade mark which is capable of registration under the provisions of this Act."

By s. 9 "a registrable trade mark must contain or consist of at least one of the following essential particulars:— . . . . (3.) An invented word or invented words; (4.) A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname . . . ."

"Parlograph" is an invented word within the meaning of s. 9. It is made up of two words, one of which is the Latin or French root referring to speech, and the other the Greek root referring

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to writing, but in itself it has no meaning whatever. The registrar seems to have thought it could not be a good trade mark as an invented word if it had "direct reference to the character or quality of the goods." But s. 9 of the Act of 1905 is the same in substance as s. 64, sub-s. 1, of the Patents, Designs, and Trade Marks Act, 1883, as amended by s. 10, sub-s. 1, of the Patents, Designs, and Trade Marks Act, 1888, and under those enactments it was held in the "Solio" case—*Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs, and Trade Marks* (1)—that an invented word might be registered as a trade mark although it had "reference to the character or quality of the goods."

A similar objection might have been made to "Bovril," which was, however, held to be a good trade mark as a "fancy word" (see *In re "Bovril" Trade Mark* (2)), or to "Mazawattee," also held to be good as a "fancy word" (see *In re Densham's Trade Mark* (3)), or to "Motorine," which was held to be a good mark as an "invented word" (see *In re Compagnie Industrielle des Pétroles' Application* (4)).

The word is not intended to be used as a trade mark with reference to talking machines only, but with reference to those and a number of other goods of totally different kinds.

Sir S. O. Buckmaster, S.-G., and *Austen-Cartmell*, for the Registrar of Trade Marks. There are two questions for decision—(1.) whether "Parlograph" is used to denote a particular article, and not in connection with goods to indicate the manufacturer or originator of the goods; and (2.) whether the word is an "invented word" within the meaning of s. 9 of the Act of 1905.

The word is not used or intended to be used in connection with goods of the proprietor of the mark, but only to denote the character of the goods—a particular article in fact. This view is confirmed by an examination of the pamphlet which was before the registrar. A "parlograph" is there shewn to be a talking machine. That is the particular article referred to in the mark proposed to be registered. Registration will not be allowed of a

(1) [1898] A. C. 571.
(2) [1896] 2 Ch. 600.
(3) [1895] 2 Ch. 176.
(4) [1907] 2 Ch. 435.

word which is merely the name of the article sold: *In re Gramophone Co.'s Application.* (1) There is nothing to indicate the origin of manufacture and so satisfy the words as to "trade mark" in s. 3 of the Act of 1905.

"Parlograph" is not an "invented word or invented words." Compound words, or foreign words, are not necessarily invented words, although as English words they have never been seen before: *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs, and Trade Marks.* (2) "Parlo" can only refer to speaking, and "graph" now always means in English something written. When two root-words are put together and describe a thing there is no invention.

[SARGANT J. referred to *In re Hjorth & Co.'s Trade Mark* "*Primus.*" (3)]

A. J. Walter, K.C., called on to reply on the first point only. A word may denote, as this does, not only an article, but that it is the article of a particular proprietor. The appellants are already registered as the owners of the mark in several other countries, and it does not follow because a word denotes a certain article that it does not connote a particular manufacturer.

SARGANT J. This is an appeal by the applicants for registration as a trade mark of the word "Parlograph" from the decision of the registrar refusing the registration of the word. Two objections have been taken by the registrar—one, that the word is used not to denote the goods of a particular manufacturer, but to denote a particular article; and the other, that the word is not "an invented word or invented words" within s. 9, head (3.), of the Trade Marks Act, 1905.

The second objection seems to be the one of more general interest, and I will deal with it first. It is quite clear from the "Solio" case, *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs, and Trade Marks* (2), that a word may be registered under s. 9, head (3.), of the Act of 1905 as "an invented word or words" although it may be a word having a "direct reference to the character or quality of the goods." The

(1) [1910] 2 Ch. 423. (2) [1898] A. C. 571, 577.
(3) [1910] 2 Ch. 64.

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words of the provision of the Act of 1905 are substantially equivalent, in this respect, to the words of the enactment under which that decision was given, and the speeches of the learned Lords who took part in it are expressed to that effect.

Then comes the question whether this bastard word is or is not an invented word. It seems to me clearly to be an invented word. It is a combination of two roots from foreign languages, the one, "parl," coming from or through the French and denoting speech, and the other, "graph," being a Greek root denoting writing; and there is no doubt whatever—I am glad to say there is no doubt—that no such word as this word is to be found in any English dictionary, or has in any way been introduced into the common language of the realm. That being so, I am clearly of opinion that, within the decision of the "Solio" case, this word is "an invented word or words." That disposes of the second objection.

The other objection is more subtle. I quite appreciate this, that a trade mark is to be used, not to denote a particular article, but—dealing alone with that head of s. 9—to denote the article manufactured by a particular "company, individual or firm"; it must be used for the purpose of denoting origin. It is said here that, looking at a particular pamphlet which was before the learned registrar, there is no attempt to identify "Parlograph" with the persons manufacturing the instrument so called in the pamphlet, and that there is an attempt to identify "Parlograph" with the instrument itself; and for that purpose the "Gramophone" case, *In re Gramophone Co.'s Application* (1), and certain observations of Parker J. (as he then was) in that case, have been referred to. But the "Gramophone" case was a totally different case. There the word "gramophone" was shewn by its appearance in various specifications and the like, and in dictionaries, to have been in use as a generic term prior to the incorporation of the Gramophone Company, Limited, which was applying for registration of the word. It is clear, therefore, that in that case there was a meaning attached to "gramophone" as denoting a particular article or class of

(1) [1910] 2 Ch. 423.

articles, and not as denoting a particular manufacturer; and indeed there was a good deal of evidence to shew that the word meant the type of machine which recorded by means of a disc as contrasted with the type of machine which recorded by means of a cylinder. But in the case of a word like "Parlograph" which is invented for the first time, there is every prima facie reason to suppose that it is not intended to denote any particular class of article unless the article is in itself a new and distinctive type. Here, if one looks through this pamphlet, there is no suggestion whatever, and I believe it not to be the fact, that the machine produced by the applicants is, in any respect, a distinctive type of machine or a distinctive article. All the "talking points" which are spoken of in the pamphlet are points relating to the quality of the machine and the results produced by it, not to the distinctiveness of the machine itself.

Further, there is evidence that the word "Parlograph" has been used and registered as the trade mark of the applicants in a very large number of foreign countries. It seems to me that "Parlograph" means, and will mean if I allow the registration, recording machines or articles for recording machines of the quality or make produced by this particular manufacturing company, and that, in that sense, it will be a perfectly legitimate and proper trade mark.

I therefore overrule the decision of the learned registrar and direct the registration to proceed.

A. J. Walter, K.C. Sect. 48 of the Act of 1905 provides that the costs of the registrar shall be in the discretion of the Court. I cannot ask that the applicants' costs should be ordered to be paid by him, and I agree that generally the applicant is ordered to pay the registrar's costs. But it is really time that a change should be made. The Court has an absolute discretion, and I submit that the privilege which the registrar has, of having his law decided for him at the expense of the unfortunate applicant, is rather a hard one upon the latter. The State should be made to bear its fair share of the burden.

Austen-Cartmell. There is nothing in the case to take it out of the ordinary rule, as laid down in the "Solio" case, that the

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applicant must pay the registrar's costs, which are part of the costs of registration.

SARGANT J. As the registrar had decided against the applicants, the office was bound to be represented on the appeal, and there must be the usual order that the applicants pay the registrar's costs.

Solicitors: *Slaughter & May; Solicitor to the Board of Trade.*

F. E.

WARRINGTON J. 1914 *April* 3.

In re GODFREE.
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[1914 G. 180.]

Tenant for Life and Remainderman—Enjoyment of Income in Specie—Trust for Sale and Conversion—Full Power and Discretion to postpone—Trust Premises "constituting or representing" Residuary Estate—Appropriation of Shares.

Testator, who died in 1913, gave his real and personal estate to trustees on trust for sale and conversion, with the fullest power and discretion to postpone the sale or conversion of the whole or any part thereof during such period as they should think proper, and to invest the proceeds in manner thereby authorized; and declared that the trustees should "divide the trust premises constituting or representing" his residuary estate into as many shares as he should leave children who should survive him or have died in his lifetime leaving children who should survive him, and should appropriate one of such shares to each such child on trust to pay the income unto each such child during his or her life with remainder on trusts in favour of his or her children. The testator's estate at the date of his death comprised some small leasehold properties and divers investments which were not authorized by the will but which had not yet been sold or converted by the trustees. No appropriation of the children's shares had yet been made:—

Held, that, as between tenants for life and remaindermen, the tenants for life were entitled to receive the whole of the income of the residuary estate in its actual state of investment including the income of any unauthorized investments, whether wasting or permanent, retained by the trustees under their discretionary power to postpone sale and conversion.

In re Thomas [1891] 3 Ch. 482 followed.

ADJOURNED SUMMONS.

A. H. Godfree, by his will dated April 25, 1912, gave his real

and personal estate, subject to and after the payment of his debts, testamentary expenses, and legacies, unto trustees upon trust to sell and convert the same at such time as they should think fit, with the fullest power and discretion to postpone the sale or conversion of the whole or any part of the said premises during such period as they should think proper without being responsible for loss, and to invest the residue of the said moneys in any of the modes of investment thereinafter authorized; and the testator declared that his trustees should "divide the trust premises constituting or representing" his residuary estate into as many equal shares as he should leave children who should survive him or should have died in his lifetime leaving issue surviving him, and should appropriate one of such shares to each such child who should survive him or should have died leaving issue as aforesaid (and so that any reference thereinafter contained to the shares of any respective children in the said trust premises should be deemed to apply to the shares thereinbefore directed to be appropriated to them respectively whether they should respectively survive him or not), but so nevertheless that such respective shares should be held by his trustees upon the trusts and subject to the powers and provisions thereinafter declared and contained concerning the same respectively; and the testator declared that his trustees should retain the share directed to be held for the benefit of each such child and should during the life of such child pay the income of his or her said share to him or her with remainder after the death of each such child upon trusts therein declared in favour of his or her children; and the testator declared that his trustees should invest any moneys forming part of his trust estate under his will in the modes of investment therein authorized.

The testator died on November 20, 1913, leaving six children him surviving and five grandchildren.

The testator's estate was of large value and comprised a freehold house (the use and occupation of which was given to his widow for such period as she should desire), and two leasehold stables of small value, and divers investments in the shares and securities of public companies which were not investments authorized by the will unless authorized by the power to postpone

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the sale and conversion of the estate. No appropriation of the children's shares had yet been made.

This was an originating summons taken out by the trustees raising (inter alia) the question whether the whole of the income of the real, leasehold, and residuary personal estate, until sale or conversion, ought as between tenant for life and remaindermen to be treated and applied as income, or whether the leasehold hereditaments and retained investments not authorized by the will ought to be treated as converted at the end of a year from the testator's death.

E. F. Buckley, for the trustees.

C. W. Turner, for the tenants for life. The present case is undistinguishable from *In re Thomas* (1), where on a very similar will Kekewich J. found a sufficient indication that the tenants for life were to enjoy the income in specie, relying on the direction that the trustees were to deal with the income of the securities for the time being "constituting or representing" the testator's estate, which he considered must include the securities retained under the discretionary power. The only difference is that in that case the trustees had a discretionary power to retain any securities, while in the present case they have a discretionary power to postpone conversion; but there is no substance in that distinction. In that case as in this there was no direction what was to be done with the income of the retained securities except what was to be gathered from the inclusion of them as constituting or representing the residuary estate. In *In re Nicholson* (2), following *Gray* v. *Siggers* (3) and dissenting from the view of Hall V.-C. in *Porter* v. *Baddeley* (4), your Lordship decided that there is no distinction for this purpose whether the securities are of a permanent or of a wasting character, but there was no trust for conversion in that case. [He also referred to *In re Chaytor* (5), *In re Bates* (6), and *In re Wilson.* (7)]

P. F. S. Stokes, for the remaindermen. The direction to pay the income to the tenants for life refers to the income of the

(1) [1891] 3 Ch. 482.
(2) [1909] 2 Ch. 111.
(3) (1880) 15 Ch. D. 74.
(4) (1877) 5 Ch. D. 542.
(5) [1905] 1 Ch. 233.
(6) [1907] 1 Ch. 22.
(7) [1907] 1 Ch. 394.

appropriated shares, and the trustees have no power to appropriate unauthorized investments. The power to postpone conversion is a ministerial power given for the convenience of realization, and it is only when the estate has been realized and converted into the condition authorized by the testator that the trust for division comes into operation. There is no direction that the income of the unauthorized securities in the meantime is to go in the same way as the income of the proceeds of sale and conversion, and there is no definition of what the testator means by his "residuary estate." A decision in favour of the tenants for life will go further than any authority has yet gone in the case of a mere power to postpone sale and conversion.

Roope Reeve, for other parties.

WARRINGTON J. The question is whether the testator's children who are tenants for life of their shares in his estate are entitled to the income of any unauthorized securities forming part of the testator's estate at the date of his death and which may on any division by the trustees form part of the individual shares of the children. Part of the estate consists of securities not within the powers of investment conferred by the will, and the question is whether the children, the tenants for life of their respective shares, are entitled to the income of these unauthorized securities so long as the trustees postpone the sale and conversion of them, or only to interest at a certain rate on the value of such securities from the date of the testator's death.

The real question is as to the effect to be given to the direction given to the trustees in ascertaining the shares of the children. The trustees are directed to divide the trust premises "constituting or representing" the testator's residuary estate. When the trustees come to make that division, what have they got in their hands? I assume that they have not then converted the whole of the estate, but that they continue to hold securities not authorized under the trust for investment contained in the will. These securities, therefore, constitute part of the residuary estate, and the trustees are directed to divide them and then they are to appropriate one share to each child, and the testator has inserted words to shew what he means when he refers to the share or income

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of the share of each child. So long as the trustees do exercise the power of postponing sale and conversion they cannot act without dividing unauthorized securities as well as authorized securities, and if they are to divide unauthorized as well as authorized securities, then it seems to me that the unauthorized securities are securities "constituting or representing" part of the testator's residuary estate the income of which is directed to be paid to the tenants for life. In my opinion the present case falls within the decision of Kekewich J. in *In re Thomas* (1) and is in substance undistinguishable from that case. It is true that the trustees in the present case have no power to permanently retain the securities in question. They have only power to postpone the sale or conversion, but I do not think that that distinction really affects the question before me, though it may affect the duties of the trustees in the exercise of their discretionary power of postponing the sale and conversion. So long, therefore, as the trustees in the exercise of that discretion do retain the securities, and though no division has actually taken place, I am of opinion that the tenants for life are entitled to the whole of the income, and I make a declaration accordingly that, as between tenants for life and remaindermen, the tenants for life are entitled to receive the whole of the income of the residuary estate in its actual state of investment, including the income of any unauthorized investments, whether wasting or permanent, retained by the trustees under their discretionary power to postpone sale and conversion.

Solicitors: *Torr & Co.*

(1) [1891] 3 Ch. 482.

A. C

WARRINGTON J.
1914
May 1.

In re MAYNE.
STONEHAM *v.* WOODS.

[1914 M. 658.]

Will—Construction—Specific Bequest—Securities "standing in my name"—Foreign Government Bonds to Bearer—Custody of Testatrix's Bankers.

Testatrix specifically bequeathed all the "stocks, shares, debentures, debenture stock and all other securities which shall be standing in my name at my decease." At her decease the testatrix was possessed of foreign Government bonds to bearer which, together with certain stock certificates, were kept by her bankers in an envelope marked outside with her name and also with a reference to the page of a safe custody register kept by the bankers on which the securities were entered under the heading of her name:—

Held, that the bonds to bearer were not included in the specific bequest.

ADJOURNED SUMMONS.

Katherine Emily Mayne, who had a general testamentary power of appointment over a sum of 4500*l.* under her father's will, and was also possessed of investments of the value of some 800*l.*, by her will, dated March 7, 1910, appointed Paul Woods and William Stoneham her executors and trustees, and, after reciting her general testamentary power, bequeathed 1000*l.* part of the said sum of 4500*l.* to Thomas Pascoe absolutely, and as to 3500*l.*, the remainder thereof, bequeathed the same to her trustees in trust to invest and pay the income to Thomas Pascoe during his life, with remainder in trust for his children. And the testatrix continued: "I give and bequeath to the said Paul Woods all the stocks, shares, debentures, debenture stock and other securities which shall be standing in my name at my decease," and also certain articles of furniture, jewellery, and effects therein specifically mentioned; and as to all the residue of her estate and effects the testatrix gave the same upon the same trusts and to the same persons as the said sum of 3500*l.* thereinbefore bequeathed.

The testatrix died in 1913.

The testatrix kept her banking account with the Newton

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Abbot branch of the Capital and Counties Bank. At the time of her death the testatrix was entitled to two 4½ per cent. Japanese Government bearer bonds, first series, of the nominal amount of 200*l.* each. The said bonds were purchased seven or eight years before her decease through the brokers of the Capital and Counties Bank, on an order from the manager of the Newton Abbot branch, on instructions given him by the testatrix. The said bonds were kept by the bank at Newton Abbot in an envelope with the stock certificates of certain Gas Light and Coke Company stock and Salmon and Gluckstein shares also belonging to the testatrix, and they were also entered in a book kept by the bank of securities lodged by customers with the bank for safe custody. The said envelope was marked outside "Miss K. E. Mayne," written by the manager of the branch, and with "S. C. R.," written by the checking officer of the bank, and the number 122. The letters "S. C. R." meant "safe custody register," and 122 referred to the folio in that register The entry in this register book relating to the testatrix's securities was headed "Katherine Emily Mayne." Each half-year the coupons were cut by the manager or by one of the authorized clerks of the bank from the said bonds, and they were collected by the bank for the testatrix and placed to the credit of her current account.

This was an originating summons taken out by William Stoneham against Paul Woods and Thomas Pascoe for the determination of the question whether the Japanese bonds were comprised in the specific bequest to Paul Woods or passed under the residuary bequest.

H. T. Method, for the summons.

A. C. Nesbitt, for Paul Woods. The testatrix had two classes of property at her disposal, that over which she had a general power of appointment and the stocks and securities and other small belongings which were her own property. The will distinguishes between these two classes of property, but does not draw any distinction between the items of her own property, all of which the testatrix intended to dispose of under the specific bequest. The words "standing in my name" have no technical

significance, and as a matter of fact the bonds to bearer were in the custody of her bankers under the testatrix's name.

H. F. F. Greenland, for Thomas Pascoe. The words "standing in my name" mean such investments as are registered or taken in the name of the testatrix and cannot be construed to include these bonds to bearer. *Ridge* v. *Newton* (1) is directly in point. A direction to trustees to invest money in their names would not authorize them to invest in bearer securities.

[He was stopped.]

WARRINGTON J. This summons raises a very curious point. [His Lordship stated the nature of the testatrix's property and the provisions of the will and continued:] I find that the investments of which the testatrix was possessed at her decease included two Japanese 4½ per cent. bearer bonds for 200*l.* each, and the question is whether those bonds passed to the specific legatee or passed under the residuary bequest. In the first place these bonds were certainly not standing in the testatrix's name in the sense in which the expression is used with regard to investments. The specific legatee has to discharge the onus of establishing that the property which he claims falls within the description used in the will. It is clear that bonds to bearer treated as investments cannot be said to be standing in the name of the testatrix; but the specific legatee relies on some further facts. The testatrix purchased the bearer bonds in 1906 through her bankers, and they remained in the custody of the bank on her behalf. They were placed in an envelope on which her name was placed, and in the "safe custody register" there was an entry of these bonds in her name. The question is, are these circumstances sufficient to bring the bonds within the description of "securities which shall be standing in my name at my decease"? In my opinion they are not. In my opinion the entry in the books of the bank merely records the fact that those particular documents were held by the bank for safe custody on behalf of a particular customer. When any one speaks of "securities" standing in his name he means moneys represented by securities taken in his name and not that the

(1) (1842) 2 D. & War. 239, 249, 250.

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actual paper or parchment happens to be in his own custody or that of another person under his name. If the contention of the specific legatee in the present case were allowed to succeed, questions would always be arising as to whether the mere fact that private papers were in some receptacle with the testator's name on it was or was not sufficient to answer some similar description. Supposing that the present testatrix had simply kept the bonds in a drawer, enclosed in an envelope addressed to her by her brokers, could they have then been said to be standing in her name? In my opinion, if I were to put upon the words of this will any other interpretation than the ordinary one of securities taken in the testatrix's name, I should become involved in a maze of possible interpretations from which it would be very difficult to extricate myself. I must, therefore, declare that these bonds did not pass under the specific bequest.

Solicitors: *Bridgman, Willcocks, Cowland, Hill & Bowman, for Watts, Woollcombe & Co., Newton Abbot.*

A. C.

SARGANT J
1914
April 30.

In re COMPTON.
VAUGHAN *v.* SMITH.

[1914 C. 526.]

Will—Construction—Specific Legacy with Addition of Words "as a general and not as a specific legacy"—Liability of Legacy to Abatement.

A testator gave to B. a specific legacy of stocks, bonds, and shares "as general and not as specific legacies." He gave other shares in trust for B. for life and after her death to transfer such shares to P. "as a general and not as a specific legacy." He gave other shares in trust for C. for life, then to D. for life, and after D.'s death to transfer the shares to E. absolutely (omitting the words "as a general and not as a specific legacy"). The will also contained general pecuniary legacies. The estate was insufficient to pay all the legacies in full:—

Held, that the legacies to B. and in trust for B. and P., although specific, must abate with the general legacies; that they must be taken as of their value at the expiration of a year from the testator's death; and that no income of the property given was payable to the legatees in the interval.

Ralph Compton, by his will, dated July 23, 1912, appointed F. H. Vaughan his sole executor and trustee, and after releasing and forgiving a debt alleged to be due from some persons in Canada, and giving to one of them certain jewellery and other personal effects, and giving to William Smith the sum of 100*l.*, proceeded as follows: "I bequeath to Annie Potter Bird the following sums, that is to say, of 300*l.* Swansea Harbour Trust 4 per cent. stock, of 500 dollars secured by the 5 per cent. Gold Bond, numbered 720, of the Michigan United Railways Company, of 200*l.* secured by the bonds, numbered 125,551 and 125,552, in the Imperial Japanese Government 4 per cent. Sterling Loan, 1910, and of 200*l.* Ocean Debenture Stock of the Commercial Union Assurance Company, Limited, all now standing in my name, as general and not as specific legacies. I bequeath to my trustee 280 shares of 1*l.* each, fully paid, in Benger's Food, Limited, all now standing in my name, Upon trust to pay the dividends thereof to the said Annie Potter Bird during her life," and after her decease to transfer such shares to Thomas Partridge "as a general and not as a specific legacy. I bequeath to

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my trustee 20 fully paid shares of 10*l.* each in the Rio Claro San Paulo Railway Company, Limited, all now standing in my name, Upon trust to pay the dividends thereof to Mary Compton" during her life, and after her decease to pay such dividends to Raffaelle Compton, and after her decease upon trust to transfer such shares to Harriette Porter "absolutely" (the words "as a general and not as a specific legacy" being here omitted). The testator then gave certain sums assured by policies of life assurance to his trustee upon the same trusts as those declared with reference to the trusts of the shares in the Rio Claro Company. The testator then bequeathed to his trustee all other his "stocks, shares, and securities" upon certain trusts in favour of Caroline Eleanor Balleny during her life, and after her death in favour of her children, and devised a freehold messuage to Caroline Eleanor Balleny, and devised and bequeathed all his residuary real and personal estate to Annie Potter Bird.

The testator died in September, 1913, and his trustee and executor proved the will.

Caroline Eleanor Balleny, William Smith, Mary Compton, and Raffaelle Compton were all blood relations of the testator. Annie Potter Bird, Thomas Partridge, and Harriette Porter were not relatives of the testator.

The personal estate of the testator, other than the securities comprised in the specific legacies, was of such small value that some of the legacies given by the will had to abate.

F. H. Vaughan, the trustee, took out an originating summons against William Smith, Annie Potter Bird, Thomas Partridge, and Caroline Eleanor Balleny, raising (amongst others) the questions (1.) whether, according to the true construction of the will, the bequest of stocks and bonds in favour of Annie Potter Bird and the trust legacy of shares in favour of her during her life with remainder to Thomas Partridge ought to be construed as bequests of the value of such stocks, bonds, and shares, and, if so, whether such value ought to be estimated as at the testator's death or at the expiration of one year therefrom, or how otherwise, and whether, for the purpose of such abatement, such legacies ought to be treated as general or as specific legacies, and (2.) whether the trust legacy of stocks, shares, and securities in

favour of Caroline Eleanor Balleny and her children was a general or a specific legacy or a gift of residue, and, if residuary, whether the same ought to abate before the general legacies.

W. A. Jolly, for the plaintiff, stated the facts and the questions involved.

Harold Church, for the defendant Smith, and *L. F. Potts*, for the defendant Balleny. Some meaning must be given to the words "as general and not as specific legacies." These or similar words are used as regards only some of the specific legacies, and shew an intention to make a difference in effect where the words are used. Both of the legacies are undoubtedly specific and not general, but the effect of the addition of the words in question is to give to the legacies all the attributes and incidents of general legacies, some of the consequences being that they are liable to abate with the general legacies; that their value must be taken as at one year after the testator's death; and that no income is payable in the meantime. It was quite competent for the testator to direct in what order his estate should be distributed, and he has done so by using these words. He could do this just as any testator could declare effectually that his realty should be deemed to be converted into personalty. [They referred to *Auther* v. *Auther* (1); White and Tudor's Leading Cases in Equity, 8th ed. vol. i. p. 836; Theobald on Wills, 7th ed. p. 148.]

H. S. Preston, for the defendants Bird and Partridge. The legacies are both specific and not general. There are three courses open to the Court. One is to put some meaning on the words; another is to reject them altogether as being repugnant; and the third is to transpose the words and read them as meaning "as a specific and not as a general legacy." The best course would be to treat the words as repugnant. The words "as a general and not as a specific legacy" are used, as an addition to a bequest of stock, in Key and Elphinstone's Conveyancing Precedents, 9th ed. vol. ii. p. 790.

The two legacies do not abate until the general legacies have been exhausted, and then only with the other specific legacies.

(1) (1843) 13 Sim. 422.

SARGANT J. 1914 COMPTON, *In re.* VAUGHAN *v.* SMITH.

SARGANT J. The first question on this summons is a very short but extremely difficult one, namely, what is the meaning I have to attach to a gift of certain legacies, which are undoubtedly apart from certain final words specific bequests of items of property belonging to the testator, one to Annie Potter Bird absolutely, and the other in trust for her for life and after her death for Thomas Partridge absolutely. One of these bequests has, at the end of it, the words "as general and not as specific legacies," and the other has at its end the words "as a general and not as a specific legacy." The testator's estate is insufficient to pay all the legacies thereby given in full, and consequently the question arises whether the legacies comprised in those two gifts will have to abate together with the general pecuniary legacies.

Mr. Preston contended that I might adopt one of three courses—first, give some meaning to the words; secondly, reject the words as repugnant; or thirdly, transpose the words and read them as "as a specific and not as a general legacy." The third course I cannot adopt; it would in addition to the difficulty of transposition result in making the words quite useless. I think that the testator undoubtedly intended to distinguish between the gifts of these particular items and certain other specific legacies given by his will to which the words were not attached. Then are the words so repugnant that I must reject them altogether? I think not. It is quite clear, as I have said, that these are in their initial terms specific legacies and not general legacies; but the words I have read may be construed as meaning that the gift in each case is to take effect as if it had been a general legacy. Of course, it is quite competent for a testator to give stock of a certain description as a general legacy, and in Mr. Vaughan Hawkins' book on Wills, 1st ed. p. 301, the general rule is laid down that "a legacy of stock, of whatever denomination, is not prima facie a specific, but is a general legacy." Just before that, at p. 300, he sums up the law as to differences in consequences of the two kinds of gifts in this way: "A specific legacy has some advantages, as it does not abate with pecuniary legacies, and (if to a person in esse, and of a subject producing income) carries the income from the testator's death: but the

risk of failure from the particular subject not being found among the testator's property at his death outweighs these advantages." As far as I can make out, there are those three differences, and those three differences only, between a specific legacy and a general legacy, and, on the whole, I think that effect may be given to the words in question by holding that the testator intended that these specific legacies should be treated, in respect of their legal consequences, as if they had been general legacies and not specific legacies, with the result (which may very likely have been the only result present to the testator's mind) that although the particular items did happen to form part of the testator's property at the time when he made his will, the legatee would in the case of ademption, or what would otherwise have been ademption, be entitled to substituted property of the same nature as that which the testator held at the time. If that is so, all the consequences of the legacies being general and not specific must follow. And here as it happens the result of the words is not to the advantage of the legatees as was probably intended, but to their detriment, inasmuch as their legacies have to abate with the general pecuniary legacies and lose some interest.

The two legacies in question must be treated as general legacies of the subject-matter thereof taken at their value at the end of a year from the date of the testator's death, and the legatees will not be entitled to any income in respect of the legacies in the meantime.

[In answer to question 2 his Lordship decided that the legacy therein referred was specific and was, therefore, not liable to abatement until the general legacies had been exhausted.]

Solicitors for all parties : *Clement Dennis & Co.*

F. E.

NEVILLE J.
1914
May 12, 19.

CHAPPELL & CO., LIMITED *v.* COLUMBIA GRAPHOPHONE COMPANY.

[1913 C. 2290.]

Copyright—Music—Assignee of Musical Copyright—Copyright in Song with Pianoforte Accompaniment—Record for Mechanical Performance—Copy made for Purpose of making Orchestral Accompaniment to be recorded on Graphophone Disc—Right to make Discs on Notice to Author—Copyright Act, 1911 (1 *& 2 Geo.* 5, *c.* 46), *s.* 1, *sub-s.* 2; *s.* 19, *sub-ss.* 2, 7.

The rights given by the Copyright Act, 1911, to the author of a musical production to restrain the manufacturer of records for mechanical reproduction of the music, and to other persons to make such records upon giving notice to the author and paying royalties to him, do not affect any copyright vested in an assignee under an assignment made before the Act. The making of the copy of a song with pianoforte accompaniment, the copyright of which is vested in such an assignee, for the purpose of making an orchestral accompaniment, is an infringement of the assignee's copyright, and is not justified because it is done for the purpose of making a graphophone disc of and for which the notice and royalties prescribed under the Act have been given and paid to the author.

The plaintiffs in this action were the owners of the copyright in the music of a song called "Where my caravan has rested." The author of the song was Hermann Lohr, and he had assigned his rights to the plaintiffs. The song had been published by the plaintiffs with a pianoforte accompaniment. The defendants had on or about March 13, 1913, given to the plaintiffs and Hermann Lohr notice of their intention to make contrivances by means of which the said music could be mechanically performed. These notices were given in the manner prescribed by, and contained the particulars required by, the Copyright Royalty System (Mechanical Musical Instruments) Regulations issued under the Copyright Act, 1911. The defendants had caused the said music to be recorded on graphophone discs in the form of an orchestral accompaniment to the song. For the purpose of recording such an orchestral accompaniment the defendants had purchased a copy of the said song with pianoforte accompaniment and made a copy or copies thereof for the purpose of making orchestral arrangements therefrom. They had paid the author the royalties

he was entitled to under the Act of 1911. The plaintiffs brought this action for an injunction to restrain the defendants from making copies of the music of the said song without their consent, and for delivery up of copies, and damages.

The defendants alleged that they had only done what was reasonably necessary for recording the said music in the form of an orchestral accompaniment, which they contended they had a right to do under the Act of 1911.

It was admitted that before the Act of 1911 the making a copy of the music for the purpose of transforming it into an orchestral accompaniment would have been a breach of the plaintiffs' copyright.

The case turned chiefly on the construction of the Copyright Act, 1911 (1 & 2 Geo. 5, c. 46). The important sections are the following:—

Sect. 1, sub-s. 2. "For the purposes of this Act, 'copyright' means . . . . and shall include the sole right—

"(*d*) In the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered."

Sect. 19, sub-s. 2. "It shall not be deemed to be an infringement of copyright in any musical work for any person to make within the parts of His Majesty's dominions to which this Act extends records, perforated rolls, or other contrivances by means of which the work may be mechanically performed, if such person proves—

"(*a*) That such contrivances have previously been made by, or with the consent or acquiescence of, the owner of the copyright in the work; and

"(*b*) That he has given the prescribed notice of his intention to make the contrivances, and has paid in the prescribed manner to, or for the benefit of, the owner of the copyright in the work royalties in respect of all such contrivances sold by him, calculated at the rate hereinafter mentioned."

Sub-s. 7. "In the case of musical works published before the commencement of this Act, the foregoing provisions shall have effect, subject to the following modifications and additions:—

"(*c*) Notwithstanding any assignment made before the passing

NEVILLE J. 1914 CHAPPELL & Co., LIMITED v. COLUMBIA GRAPHOPHONE COMPANY.

of this Act of the copyright in a musical work, any rights conferred by this Act in respect of the making, or authorising the making, of contrivances by means of which the work may be mechanically performed shall belong to the author or his legal personal representatives and not to the assignee, and the royalties aforesaid shall be payable to, and for the benefit of, the author of the work or his legal personal representatives."

Jenkins, K.C., and *Hon. S. O. Henn Collins*, for the plaintiffs. The plaintiffs are the assignees and owners of the copyright in a musical work, namely, a song with a pianoforte accompaniment, which has been registered under the Musical (Summary Proceedings) Copyright Act, 1902 (2 Edw. 7, c. 15), in which Act "musical work" is defined as "any combination of melody and harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced."

It was decided in *Boosey* v. *Whight* (1) by Stirling J. and the Court of Appeal that a perforated roll of paper or other instrument for the mechanical reproduction of music is not a copy of a sheet of music. Therefore the making of a graphophone disc is not a breach of the plaintiffs' copyright under the Act of 1902. The Act of 1911, s. 1, sub-s. 2, which defines "copyright," makes the making of a graphophone disc an infringement of the copyright in a piece of music. But by s. 19, in case of an assignment of copyright before the Act, the right of complaining of such infringement is given to the author, not to the assignee. The same section, sub-s. 2 (*a*) and (*b*), gives any one a right to make a contrivance for mechanically performing a piece of music if he gives certain notices and pays certain royalties to the author. This the defendants have done, and if they had merely made a graphophone disc of the plaintiffs' song with its pianoforte accompaniment the plaintiffs could not complain. But they have not done that. They have made a copy or copies of our pianoforte accompaniment and used them for the purpose of having orchestral accompaniments made for their graphophone disc. This would have been a breach of the plaintiffs' copyright

(1) [1899] 1 Ch. 836; [1900] 1 Ch. 122.

before the Act of 1911, and there is nothing in that Act to take away any right which an assignee had before it was passed.

Gore-Browne, K.C., and *E. J. Macgillivray*, for the defendants. The Act of 1911 creates for the first time a copyright in reproduction of music by mechanical means, such as a graphophone disc. But at the same time it gives a right to any one to make graphophone discs on giving certain notices and paying royalties to the author who is the owner of this new copyright. The plaintiffs seek to prevent the defendants exercising the right the Act gives them of making discs, and incidentally to prevent the author receiving royalties, by interfering at a preliminary stage. It is necessary to have an orchestral accompaniment to make the song suitable for a graphophone. For this purpose the defendants have made a copy of the plaintiffs' music. It is not infringement to make a copy for one's own use: see definition of infringement, s. 2, sub-s. 2, of the Copyright Act, 1911. All the defendants have done is a necessary preliminary to doing what they are authorized to do by the Act of 1911.

Jenkins, K.C., in reply.

Cur. adv. vult.

May 19. NEVILLE J. The defendants in this case copied the music of the song, the copyright in which was vested in the plaintiffs under an assignment. The assignment was made before the Copyright Act, 1911. The music was copied in this way. It was published with a pianoforte accompaniment, and the defendants adapted it for an orchestra in a written score. I think if this were all it would amount to an infringement of the plaintiffs' copyright. It is a copy of the musical work, and it is not within the exceptions enumerated in s. 2 of the Act. The orchestration, however, was for the purpose of obtaining a graphophone record of the song with orchestral accompaniment. Does the purpose for which the copy was made exonerate the defendants from the charge of infringement? Before the Act it had been held that rolls constructed to reproduce mechanically the music were not copies and no infringement: see *Boosey* v. *Whight*. (1) Nor, having regard to

(1) [1900] 1 Ch. 122.

NEVILLE J. 1914 CHAPPELL & CO., LIMITED v. COLUMBIA GRAPHOPHONE COMPANY.

that decision, would the creation of a graphophone record be a copy or an infringement. The Act gives a limited right to the author or owner of a musical work in respect of records created for the purpose of mechanically reproducing the music. In the case of an assignment before the Act this right is given to the author and not to the assignee. Assuming what the defendants have done to have been no infringement of the author's right in respect of the record, can that alter or limit the right of the assignee to the protection for the musical work which vested in him at the date of the assignment? I do not think it can. The Act of 1911 does not purport to affect or diminish the copyright of the assignee, and I think that such right is not altered. I have already said that what the defendants have done would in itself, and taken by itself, be an infringement, and I think it remains so notwithstanding the right to protection given to the author in respect of mechanical records. Therefore the plaintiffs' action succeeds, and they are entitled to the relief they ask, and to the costs of the action.

Solicitors: *Pollock & Co.; Withers, Bensons, Birkett & Davies.*

J. R. B.

OSRAM LAMP WORKS, LIMITED *v.* GABRIEL LAMP COMPANY.

C. A. 1914

April 6, 7

[1912 O. 1359.]

Practice — Discovery—Interrogatories—Patent—Infringement—Interrogatories to discover Names of Manufacturers of Infringing Articles—Admissibility.

The plaintiffs in an action to restrain infringement of their patent issued a summons for further and better answers by the defendants to certain interrogatories. The plaintiffs were the owners of a patent for improvements in the manufacture of incandescent electric lamps. By two of their interrogatories they sought to discover from the defendants whether a particular set of 150 lamps were manufactured wholly or in part by a specified firm in Paris, or by what other persons or firms; and whether the said lamps were supplied to the defendants by the particular firm in Paris, or by what other persons or firms. The defendants admitted the sale of these lamps by them to a firm in England, but stated that none of the lamps were manufactured by the defendants; and further, that they had no knowledge of the process employed in the manufacture of the filaments of the lamps. They objected, however, to answer the two interrogatories in question on the ground that they were irrelevant and immaterial to the issues to be tried in the action, and were not sought bona fide for the purposes of the action. The avowed object of the plaintiffs was to ascertain from the defendants the sources from which the lamps were obtained, so as to enable them to identify and establish the process of manufacture employed in the production of these particular lamps:—

Held (reversing the decision of Eve J. [1914] 1 Ch. 699), that the point was covered by *Marriott* v. *Chamberlain* (1886) 17 Q. B. D. 154 and *Nash* v. *Layton* [1911] 2 Ch. 71, and that the defendants must answer the interrogatories.

Appeal from a decision of Eve J. (1)

This was an application by the plaintiffs for a further and better affidavit in answer to two interrogatories, Nos. 5 and 6, administered to the defendants.

The plaintiffs were the registered owners of two letters patent for an invention of (1.) "improvements relating to the manufacture of incandescent electric lamps," and (2.) of an "improved method of producing metallic incandescence bodies for electric glow lamps." They alleged that the defendants had infringed

(1) [1914] 1 Ch. 699.

C. A. 1914

OSRAM LAMP WORKS, LIMITED v. GABRIEL LAMP COMPANY.

their letters patent, and claimed an injunction to restrain them from so doing, and an inquiry as to damages, with consequential relief.

The defendants did not themselves manufacture the lamps which were alleged to be infringements of the patent, but purchased them from others; they denied the infringement and the validity of the patents.

By their interrogatories the plaintiffs asked, inter alia, the following questions:—

"1. Did the defendants or either and which of them sell on or about the 9th day of October, 1912, or some other and what date to Messrs. Maxwell, Butcher & Co., of 77a, Queen Victoria Street, in the city of London, 150 or some and what number of lamps? If yea, is the invoice, a copy of which is annexed hereto and the original of which may be inspected at the offices of the plaintiffs' solicitors, the invoice issued by the defendants or either and which of them for the said lamps?"

"5. If the answer to the first interrogatory is in the affirmative, were the said lamps, or any and which of them, manufactured, wholly or in part, and if in part which part, by the Compagnie Générale d'Electricité, of 5, Rue Boudreau, Paris, or by some other and what persons or firms?"

"6. If the answer to the first interrogatory is in the affirmative, were the said lamps or any and which of them supplied to the defendants or either and which of them (either wholly or in part and if in part which part) by the Compagnie Générale d'Electricité, of 5, Rue Boudreau, Paris, or by some other and what persons or firms and on what date?"

"7. If the answer to the first interrogatory is in the affirmative, were the filaments of the said lamps, or any and which of them, prepared by mixing tungsten, or some and what compound or compounds thereof, with some and what organic binding medium, whether or not then preparing the product in the form of filaments and whether or not then forming and carbonizing the said filaments, and then by some and what means removing the carbon from the said filaments?"

The first of these interrogatories was answered in the affirmative by Mr. Henry J. Simpson, the secretary of the Electric and

General Works, Limited, trading as the Gabriel Lamp Company. The answers to the other three interrogatories were as follows:—

"5. I object to answer the fifth interrogatory on the ground that it is irrelevant and immaterial to the issues to be tried in this action and is not put bona fide for the purposes of this action."

"6. In answer to the sixth interrogatory I say that the said lamps were supplied to the defendants, the Gabriel Lamp Company, but I object to state by whom the said lamps were supplied on the ground that such information is irrelevant and immaterial to the issues to be tried in this action and is not sought bona fide for the purposes of this action. I do not know nor have I the means of ascertaining on what date the said lamps were supplied to the Gabriel Lamp Company."

"7. In answer to the seventh interrogatory I say that I have no personal knowledge whatever as to the matters inquired of in the said interrogatory. I have made inquiries of the directors, officers, and servants of the Electric and General Works, Limited, trading as the Gabriel Lamp Company, as to what knowledge they have acquired as directors, officers, and servants of the said company with regard to the matters inquired of by the said interrogatory, and I have been unable to obtain any information thereon, the said directors, officers and servants informing me that they possess no knowledge as to the process employed in the manufacture of the said filaments, or any of them."

Eve J. dismissed the application (1), and the plaintiffs appealed.

A. J. Walter, K.C., and *J. Hunter Gray*, for the appellants. The appellants are entitled to obtain particulars from the defendants of the sources from which the lamps were obtained, otherwise they may not be able to discover and establish the process which was actually employed in the manufacture of the infringing lamps. Interrogatories 5 and 6 refer to facts the existence or non-existence of which is relevant to the facts directly in issue: *Kennedy* v. *Dodson* (2); *Nash* v. *Layton*. (3)

(1) [1914] 1 Ch. 699. (2) [1895] 1 Ch. 334.
(3) [1911] 2 Ch. 71, 76.

C. A. 1914 — OSRAM LAMP WORKS, LIMITED v. GABRIEL LAMP COMPANY.

T. Terrell, K.C., and *Kenneth R. Swan*, for the respondents. The fifth and sixth interrogatories are not material to the issue to be tried, though the answers may be useful to the appellants. They can only ask for information which is necessary to enable them to establish their case; they cannot ask for evidence to help them to do so. In patent cases interrogatories must be framed in accordance with the language of the specification, and in this case it is not incumbent upon the appellants to prove the identity of the manufacturers of the filaments: *Actiengesellschaft für Anilin Fabrikation in Berlin* v. *Levinstein* (1); *Marriott* v. *Chamberlain*. (2) *Nash* v. *Layton* (3) is in our favour.

No reply was called for.

COZENS-HARDY M.R. stated the facts and read the first, fifth, and sixth interrogatories and the answers to them, and continued: The defendants object to answering the fifth and sixth interrogatories on the ground that they are irrelevant and immaterial to the action to be tried and that they are not put bona fide. Now it is said on behalf of the respondents that the right to interrogate should be limited to that which is directly in issue in the action, and that the plaintiffs cannot go outside that merely to enable them to extract information which may help them to prove, in one particular way, the issue which arises between the parties. In my opinion that is a contention which cannot prevail. If authority were needed there are two authorities which are conclusive on the point. There is the very leading case of *Marriott* v. *Chamberlain* (2), where Lord Esher, in a judgment which is often referred to, says: "The right to interrogate is not confined to the facts directly in issue, but extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue." It seems to me that the information which it is sought to extract by these interrogatories, Nos. 5 and 6, is plainly relevant to the existence or non-existence of the infringement on which the plaintiffs rely. The more recent case of *Nash* v. *Layton* (3) is still more closely in point. That was a case in which an action to enforce a charge

(1) (1913) 30 Rep. Pat. Cas. 673. (2) 17 Q. B. D. 154, 163.
(3) [1911] 2 Ch. 71.

given by the defendant to the plaintiff at 10 per cent. interest was sought to be answered and defeated by the fact that the plaintiff was a money-lender within the meaning of the Money-lenders Act, and was not registered under the Money-lenders Act. The majority of this Court held that the defendant was entitled to administer interrogatories to the plaintiff as to what other loans he had transacted during a reasonable period (we fixed twelve months) before the loan in question in the action and on what security and at what rate of interest, and generally as to the circumstances of the loan, as being facts relevant to the issue raised between the parties. I confess my complete inability to distinguish that case from the present. I do not repeat what I said there and what Buckley L.J. said in his judgment, he being also one of the majority of the Court. I think that those two cases, *Marriott* v. *Chamberlain* (1) and *Nash* v. *Layton* (2), completely cover the plaintiffs here, and that the defendants must answer the interrogatories.

Buckley L.J. I agree. I think the case is covered by the principle laid down in *Marriott* v. *Chamberlain* (1) and in *Nash* v. *Layton*. (2)

Channell J. I agree. I think it is a very clear case indeed.

Appeal allowed.

Solicitors: *Bristows, Cooke & Carpmael; Jonathan E. Harris.*

(1) 17 Q. B. D. 154. (2) [1911] 2 Ch. 71.

H. C. R.

WARRINGTON J.
1914
May 1.

In re JOHNSON.
JOHNSON *v.* JOHNSON.

[1914 J. 505.]

Settled Land—Limited Owners with Powers of Life Tenant—Executors of Deceased Owner—Beneficially entitled—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 5; *s.* 58, *sub-s.* 1 (*v.*) (*ix.*).

Persons beneficially entitled under a settlement to the income arising from real estate until the death of the last survivor of them and the executors of a deceased person similarly entitled are together persons having the powers of a tenant for life under the Settled Land Act, 1882, s. 58, sub-s. 1 (ix.).

Vine v. *Raleigh* [1896] 1 Ch. 37 followed.

In re Jemmett and Guest's Contract [1907] 1 Ch. 629 explained and distinguished.

Adjourned Summons.

Orlando Robert Johnson by his will, dated May 13, 1874, gave his real and personal estate to trustees upon trust to pay the income, profits, rents and interest arising therefrom to his seven children by name in seven equal parts, the share of each daughter to be for her separate use without power of anticipation, and, in the event of the death of any of them without leaving issue, directed the share of the child so dying to be divided amongst the survivors, or any child or children (of his son or daughter) then surviving, who were to have their parent's share; and on the death of the last survivor of the seven children directed the trustees to sell and call in his real and personal estate and divide the proceeds amongst his grandchildren then living and their descendants in equal parts.

The testator died on August 8, 1876, leaving his seven children him surviving. Part of his estate consisted of freehold hereditaments.

One daughter, Frances Priscilla, died unmarried in 1877. Another daughter, Mary Elizabeth Whitwell, died in 1914, leaving issue, and having by her will, dated October 1, 1912, appointed executors and trustees, to whom she gave all her real

and personal estate upon trust for sale and conversion. The other five children were still living.

This was an originating summons taken out by the trustees of the will of Orlando Robert Johnson, upon which his Lordship decided that on the true construction of the will the original one seventh share of income of Mary Elizabeth Whitwell and also the accruing one sixth share of income to which she became entitled on the death of Frances Priscilla without issue were payable to the executors of Mary Elizabeth Whitwell until the death of the last survivor of the children.

On this construction of the will the summons asked to have it determined whether the five living children and the executors of Mary Elizabeth Whitwell were tenants for life, or had the powers of a tenant for life, in respect of the testator's real estate within the meaning of the Settled Land Acts, 1882 to 1890; and that, if and so far as might be necessary, trustees of the compound settlement created by the will of the testator and the will of Mary Elizabeth Whitwell might be appointed by the Court.

H. F. F. Greenland, for the trustees. The question is whether the five children and the executors of the deceased daughter are persons having the powers of a tenant for life within the Settled Land Act, 1882, s. 58, sub-s. 1 (ix.). (1) It is submitted that they are, though there appears to be some conflict of judicial opinion on the point between Chitty J. in *Vine* v. *Raleigh* (2) and Swinfen

(1) Settled Land Act, 1882, s. 2, sub-s. 5: "The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement."

Sect. 58, sub-s. 1: "Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act (namely) . . . .

"(v.) A tenant for the life of another, not holding merely under a lease at a rent."

"(ix.) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event."

(2) [1896] 1 Ch. 37.

WARRINGTON J. 1914 JOHNSON, *In re.* JOHNSON *v.* JOHNSON.

Eady J. in *In re Jemmett and Guest's Contract.* (1) The decision in *Vine* v. *Raleigh* (2), however, is directly in point, while *In re Jemmett and Guest's Contract* (1) is distinguishable, since in that case the trustees in question, who were held not to have the powers of a tenant for life, did not claim by derivative title, but were constituted trustees by the settlement itself. *Vine* v. *Raleigh* (2) was cited without any disapproval in *In re Bennet.* (3) [He also referred to Carson's Real Property Statutes, 2nd ed. pp. 714, 715.]

H. T. Method, for the executors of Mary Elizabeth Whitwell.

F. Baden Fuller, for the five surviving children of the testator.

H. J. H. Mackay, for the issue of Mary Elizabeth Whitwell.

WARRINGTON J. In the present case the income arising from the real estate is now divisible under the will of the testator in six shares. The persons entitled to receive one of those six shares are the executors of a deceased daughter of the testator, and the income is payable under the will until the death of the last survivor of the children, when the land is directed to be sold. The question is whether the five children now surviving and the executors of the deceased daughter constitute between them the tenant for life or have the powers of a tenant for life under the Settled Land Acts, 1882 to 1890. Sect. 58, sub-s. 1, of the Settled Land Act, 1882, provides that "Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act." Then clause (ix.) mentions "A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life . . . ." The executors of the deceased daughter are clearly persons entitled to a share of the income arising from this land under a direction for payment thereof to them during another life. The only question is whether they are properly treated as persons having the powers of a tenant for life. The identical question came before Chitty J.

(1) [1907] 1 Ch. 629. (2) [1896] 1 Ch. 37.
(3) [1903] 2 Ch. 136.

in *Vine* v. *Raleigh*.(1) In that case there was a direction to accumulate income which exceeded the period allowed by law, and accordingly the income became divisible amongst the next of kin of the testator living at his death. One of those next of kin had died having appointed two executrixes, and her executrixes were clearly entitled to receive her share, and what the learned judge decided was that the surviving next of kin and the executrixes of the deceased next of kin had the powers of a tenant for life within the meaning of the Settled Land Act, 1882. That is the exact point which I have before me in the present case, for, though in *Vine* v. *Raleigh* (1) the title arose in a different way, the nature of the interests of the parties was the same, and that decision in my opinion exactly covers the present case. But it has been suggested that the decision of Chitty J. in that case was not followed by and is inconsistent with a subsequent decision of Swinfen Eady J. in *In re Jemmett and Guest's Contract*.(2) The head-note to that case is in these terms: "Sect. 58 of the Settled Land Act, 1882, which gives the powers of a life tenant to the nine classes of limited owners therein described, only applies to beneficial owners, and therefore trustees with an estate pur autre vie cannot exercise a life tenant's powers under sub-s. 1, cl. v.: *Vine* v. *Raleigh* [1896] 1 Ch. 37 not followed." From that head-note it would appear that the point decided by Swinfen Eady J. was the same as the point decided by Chitty J. and that the later decision did not follow the former one; but when the case is examined it is plain that it involved nothing of the sort. In *In re Jemmett and Guest's Contract* (2) the settlement itself vested the land in certain trustees during the life of another person and those trustees were under the settlement to deal with the rents in a particular way, and it was upon those facts that Swinfen Eady J. held that those trustees were not persons beneficially entitled. That is perfectly intelligible because otherwise there might have been a conflict between the trustees receiving the rents and the persons beneficially entitled under the same settlement, but that consideration is not applicable to the present case because the executors of the deceased daughter in the present case are for

(1) [1896] 1 Ch. 37. (2) [1907] 1 Ch. 629.

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this purpose the only persons beneficially entitled to her share of income. So far from the case of *Vine* v. *Raleigh* (1) not having been followed, I have carefully read the judgment of Swinfen Eady J. and I think that he treated *Vine* v. *Raleigh* (1) as having nothing to do with the case before him. In my opinion the two cases are quite distinct, and I must follow *Vine* v. *Raleigh* (1) and hold that these five persons and the executors of the deceased daughter are entitled to exercise the powers of a tenant for life under the Settled Land Acts.

[His Lordship also expressed his opinion that there was no compound settlement created by the two wills, and that it was, therefore, unnecessary to appoint trustees for the purposes of any compound settlement.]

Solicitors: *Bridgman, Willcocks, Cowland, Hill & Bowman.*

A. C.

NEVILLE J.
1914
April 29, 30.

HADHAM RURAL DISTRICT COUNCIL *v.* CRALLAN.

[1913 H. 1409.]

Local Government—Water Authority—Covenant to supply Farmhouse and Farm Buildings free of Charge—Covenant running with the Land—Severable Covenant—Farmhouse altered and enlarged—No Increased User of Water for Domestic Purposes—Covenant as to Farmhouse discharged—Washing Motor Cars in Farmyard.

In 1905 the plaintiffs as the local water authority covenanted for valuable consideration with the owner of a farm called C. Farm in their district to lay a pipe to the farmhouse and to erect a standpipe at the farm buildings and to supply a reasonable quantity of water to the farmhouse and buildings free of charge. In 1911 the defendant, having become the owner, altered and enlarged the farmhouse into a residential mansion with a garage for motor cars at the farm buildings, and claimed under the covenant to have a free supply of water to the house and the farm buildings, and to use the water from the standpipe to wash his motor cars. It was conceded that the covenant ran with the land:—

Held, that the covenant was to supply a farmhouse, and that, C. Farm having ceased to be a farmhouse, the covenant as to the farmhouse was discharged.

Held, also, that the covenant was severable, and was therefore

(1) [1896] 1 Ch. 37.

not discharged as to the farm buildings which were substantially unaltered.

Held, also, that the owner was not entitled to use the water free of charge for his building operations at the farmhouse, nor for washing his motor cars at the farm buildings.

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WITNESS ACTION.

In the year 1905 the plaintiffs, who were the water authority for their district, were contemplating a scheme of water supply for the parish of Much Hadham in Hertfordshire, and by an indenture dated April 13, 1905, one Hugh Parnell, the then owner of a farm known as Chaldean's Farm in the parish, sold and conveyed to them a piece of the farm as a site for a reservoir. By this indenture the plaintiffs covenanted that they would on completion of the scheme lay down all necessary pipes for a reasonable supply of water up to Chaldean's Farm House (but not any internal pipes or fittings), and also would lay down pipes and erect a standpipe for a reasonable supply of water to the farm buildings free of all expense to the vendor or his tenant, and would supply a reasonable quantity of water for the use of the house and for the said standpipe free of charge.

The plaintiffs on completion of their scheme laid pipes to the farmhouse and erected a standpipe at the farm buildings in accordance with their covenant, and until the events after mentioned gave a supply of water free of charge.

In 1911 the defendant, who had become the owner and occupier of Chaldean's Farm, altered and greatly enlarged the farmhouse and converted it from a farmhouse, occupied as such together with about 100 acres of agricultural land by a tenant farmer, into a residential mansion standing in three acres of grounds with no agricultural land attached thereto and called it Carldane Court. He also converted part of a stable at the farm buildings into a garage for his motor cars, and he let off the rest of the farm buildings and of the agricultural land to a farmer who did not reside on the farm. The defendant commenced the alterations in February, 1911, and claimed the right to use the plaintiffs' water free of charge for his building operations. The plaintiffs denied this and cut off the water supply, and thereupon on February 25, 1911, the defendant, under

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protest and without prejudice to his rights, signed an agreement to pay for the water supplied by the plaintiffs in accordance with their usual scale of charge. The defendant went into occupation of Carldane Court in May, 1912, and disputes arose between him and the plaintiffs as to his rights under the covenant and his right to use the water from the standpipe free of charge at the farm buildings for washing his motor cars, and eventually the plaintiffs commenced this action in June, 1913.

The plaintiffs by their statement of claim alleged (amongst other things) that the covenant did not run with the land; that the defendant by his acts had completely changed the character and user of the farmhouse for the use of which they agreed to supply a reasonable quantity of water free of charge, and had destroyed and confounded its identity and the measure of their liability, and that the defendant was not entitled to demand a free supply of water to Carldane Court or to the farm buildings or to any part thereof respectively; that since May, 1912, the defendant had continued to use the plaintiffs' water for household purposes without paying for such user; that the defendant was liable to pay under his agreement of February 25, 1911, for the water used by him for his building operations, and had wrongfully used for washing his motor cars the water supplied to the farm buildings; and they claimed declarations accordingly. They also claimed payment of (*a*) 16*l.* 16*s.* for water supplied to Carldane Court during 1912 and 1913, (*b*) 5*l.* for water supplied for building purposes, and (*c*) 1*l.* for water supplied for washing motor cars for 1912 and 1913—altogether 22*l.* 16*s.*

The defendant by his defence pleaded that the covenant ran with the land, and that, as the owner in fee of the land, he was now entitled to the benefit of the covenant; that the alteration and restoration of Chaldean's Farm House carried out by him in 1911 did not effect or involve any increased liability or burden on the plaintiffs under their said covenants, and in any event such alteration and restoration did not affect the farm buildings in the covenants, which covenants were severable. He denied that he had completely changed the character of the house and had destroyed and confounded its identity and the measure of

the plaintiffs' liability; he alleged that the plaintiffs had wrongfully cut off his water supply in February, 1911, and that to obtain a supply he had, under protest and without prejudice to his rights, signed the agreement of February, 1911; and he denied that his user of the water from the standpipe at the farm buildings for washing his motor cars was a wrongful act; and he counterclaimed for an injunction to restrain the plaintiffs from cutting off his water supply.

It appeared from the evidence that in 1905 Chaldean's Farm was occupied by a tenant farmer who kept from twelve to eighteen cows and ran a dairy. His water supply came from a well on the premises, and there was a pond for cattle. The farmhouse, which consisted of nine rooms with only an outside earth closet, was described in the valuation list as "House and buildings, 3 r. 16½ p. Gross value 12*l*. Rateable value 10*l*. 15*s*." When the plaintiffs laid on their main up to the farmhouse, the tenant laid a connecting pipe to the dairy for cooling purposes, and also a pipe to the kitchen. The pond was filled up, and the water from the standpipe at the farm buildings was used for cattle and other farm purposes. The defendant, in carrying out his alterations in 1911, removed the dairy and diverted the pipe that had supplied it to a w.c. placed in the old part of the farmhouse, and the pipe supplying the kitchen remained. The main walls of the farmhouse were encased in the new buildings, but the interior was altered and additional rooms and offices were built on. There were two w.c.'s and two bath rooms in the new buildings which were supplied with water either from the well or from rainwater cisterns. Carldane Court when completed comprised some eighteen rooms with usual offices and the motor garage, and was described in the valuation list as "House and grounds, 2 a. 3 r. 16¾ p. Gross value 120*l*. Rateable value 96*l*."

Peterson, K.C., and *Gerard Hill*, for the plaintiffs. We do not propose to argue that the covenant does not run with the land. Assuming the benefit of the covenant runs with the land, we contend that the defendant has so altered and enlarged the farmhouse that he has lost the right to a free supply of water under the covenant. There is no direct authority on the point,

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but in *Pringle* v. *Taylor* (1) it was held that if a party entitled under a contract to receive a profit from another by his own act confounds the measure of that which he was to receive, he vacates the whole contract: so also, in the case of easements, if the dominant tenement materially increases the burden of the servient tenement, the right is lost: *Ankerson* v. *Connelly*. (2) Here, the defendant has added enormously to the old house, it is no longer the old farmhouse, and he has built a motor garage at the farm buildings and has increased the burden of the plaintiffs under the covenant. But if the covenant is severable, it is a contract to supply water to the farm buildings attached to the farmhouse; but the defendant has let off the farm buildings to the occupier of another farmhouse, and the claim is for a water supply to farm buildings not attached to the old farmhouse but to another and new farmhouse. At any rate the defendant was not entitled under the covenant to use the water at the house for his building operations, nor the water from the standpipe at the farm buildings for washing his motor cars.

Jenkins, K.C., and *Roope Reeve*, for the defendant. First, as to the farm buildings. Even if the user of water from the standpipe for the motor cars is unauthorized, the defendant has not lost his right to a supply of water. The question turns on the construction of the covenants, which are severable.

[NEVILLE J. I think they are severable. But you are not entitled to use the water from the standpipe for the motor cars. That in my opinion is an excessive user, and if you do so the plaintiffs can cut off the water.]

Assuming that to be so, they have elected to charge the defendant for the water and are suing for it, and nothing has happened since to entitle them to say that he has for ever lost his right to a supply of water under the covenant. Then as to the house, we do not defend the user of the water for building purposes and submit to pay for it. But the important general question is that an excessive user of water at the house is not alleged, and we are entitled to a supply measured by the requirements of the old house. Then is the house the house mentioned

(1) (1809) 2 Taunt. 150.

(2) [1906] 2 Ch. 544; affirmed on appeal [1907] 1 Ch. 678.

in the covenant? Some latitude must be given in construing the contract. The character of the house is the same as before, namely, residential. If a bath room and w.c. had been placed in the old house by the tenant, could such an addition or the substitution of a w.c. for an earth closet so alter the house as not to make it the same house? The kernel of the old house still exists encased in the new house, and the extra living rooms have no real bearing on the water supply. The question depends on the words "reasonable for the use of the house." Do they mean reasonable from time to time or reasonable within the contemplation of the parties at the time? It is submitted that the altered building is the house within the meaning of the covenant. The alteration of the name is not material, and it is the house mentioned in the covenant although larger and more commodious. *Pringle* v. *Taylor* (1) is not in point. There the contract was to work an engine to drain the plaintiff's mines "as they then stood" and the plaintiff began to work a deeper seam that required more power to drain it. *Luttrel's Case* (2) is more like the present, where it is said that if a man has estovers by grant or prescription to his house and alters the rooms and chambers of the house, by which no prejudice accrues to the owner of the house, it is no destruction of the prescription, nor shall he lose his prescription if he makes a new addition to his house, but he cannot spend any of his estovers in the part newly added. The principle of ancient lights applies. You can build and alter as you like so long as you do not throw a greater burden than before on the servient tenement: *Harvey* v. *Walters*. (3) Here no attempt has been made to throw any increased burden on the plaintiffs. The water supply the defendant claims does not exceed the user before the alterations were made. The alterations have not changed the character of the house as a dwelling-house, and it is submitted that the plaintiffs cannot say the defendant's house is not the house contemplated by the covenant. As to the counter-claim, we are entitled to an injunction on the facts.

Peterson, K.C., in reply, referred to *Sheffield Waterworks Co.* v. *Bingham*. (4)

(1) 2 Taunt. 150.
(2) (1601) 4 Rep. 86a, 87a.
(3) (1873) L. R. 8 C. P. 162, 166.
(4) (1883) 25 Ch. D. 443.

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NEVILLE J. I think this case really turns upon the construction of the contract entered into by the district council, who were the water authority supplying the water, with the owner of the property in question, and the important clause in the conveyance is the covenant which provides that "The council shall lay down all necessary pipes for a reasonable supply of water up to Chaldean's Farm House (but not any internal pipes or fittings) and also will lay down pipes and erect a standpipe for a reasonable supply of water to the farm buildings free of all expense to the vendor or his tenant, and will supply a reasonable quantity of water for the use of the house and for the said standpipe free of charge." It is upon the last sentence that the question turns. It is obvious that if you take the words in their strict grammatical sense they are meaningless. There is no measure. You cannot tell what is a reasonable quantity of water. They must mean to supply water for the reasonable use of the house, otherwise there is no measurement of the reasonableness. There is no such thing as a reasonable quantity of water unless it is measured by the use of the house. That, I think, is the governing intention in that sentence.

The main question between the parties is whether under the circumstances which now exist the defendant is entitled to insist upon a supply of water free of charge to the house which he now occupies, the fact being that Chaldean's Farm House has been altered and enlarged to a very considerable extent. It seems to me it is a question of degree. I think there is no doubt the contract was simply to supply Chaldean's Farm House, and, if you find that Chaldean's Farm House has ceased to exist substantially as it was at the time the contract was entered into, the right of the covenantee has gone, he having himself destroyed the house in respect of which the contract to supply the water was made. Is the house in which the defendant now resides and which belongs to him Chaldean's Farm House or not? In my opinion it is nothing of the kind. It has ceased to be a farmhouse and has been turned into a substantial modern residence, and it is neither a farmhouse nor is it the Chaldean's Farm House. It seems to me to be impossible to extend the covenant to the new house.

Then it is said that so long as the covenantee does not take more water from the council than he would have taken or did take when Chaldean's Farm House was existing he is entitled to a free supply. It seems to me that that argument cannot prevail because the defendant has destroyed the measure by which the obligation of the covenantor can be ascertained. It is not a contract for a supply of so much water as would amount to a reasonable user by the house. I mean it is not an amount to be measured by gallons. So long as the inhabitants of the Chaldean's Farm House only used the water reasonably no objection could be taken by the council, however much was used. On the other hand the council had the advantage of non-user when the house was empty, and so forth. They contracted to supply a small farmhouse and they are now asked to supply a totally different house, a large residential house, subject it is said only to limitation to such a quantity as may be ascertained to be the amount required for the reasonable supply of the old house. I do not think that is within the contract. It seems to me the subject-matter has been altered and that the measure of the obligation of the covenantor can no longer be ascertained, and so far the plaintiffs succeed against the defendant.

Then comes this further question. Part of the contract is to supply water to a standpipe for the reasonable supply of water to the farm buildings. Those farm buildings have been let off, but that seems to me to make no difference. They now are substantially the same farm buildings as were there at the date the contract was entered into. A motor garage has been built in which the occupant of the house puts and washes his motor cars, and a question arises whether that is within the purview of the contract. I do not think it is. I do not think the motor garage forms any part of the farm buildings to which the contract refers. It seems to me that the defendant by building the garage and using the water from the standpipe for the purpose of washing his motor cars has not lost his right under the contract. He did wrong in using it as he has done, but I think his right to a proper and legitimate use of the water for the farm buildings remains. A small part of the farm buildings he still retains, the rest is let to the farmer who has

NEVILLE J. 1914 HADHAM RURAL COUNCIL v. CRALLAN.

had a new house built for him in the neighbourhood. It does not seem to me that the division of the farm buildings in any way increases the obligation or throws any extra burden on the covenantors. I think the counter-claim fails and must be dismissed. The plaintiffs are entitled to judgment for 22*l.* 16*s.*

Solicitors: *Rooks, Spiers, Wales & Ward; King, Adams & Co.*

H. L. F.

C. A. 1914 *May* 4.

WHITTINGTON GAS LIGHT AND COKE COMPANY, LIMITED *v.* CHESTERFIELD GAS AND WATER BOARD.

[1912 W. 3120.]

Company—Local Government—Injunction—Gas—"Main" or "service pipe"—Extension of Mains—Chesterfield Gas and Water Board Act, 1895 (58 & 59 *Vict. c. cxlvii.*), *s.* 4.

The defendants were incorporated under the Chesterfield Gas and Water Board Act, 1895, for the purpose of acquiring the undertaking of the Chesterfield Waterworks and Gas Light Company, and by s. 4 of that Act the limits for the supply of gas and water were to be the existing limits of the company, and it was provided that it should not be lawful for the defendants to extend the existing mains of the company for the supply of gas in the parishes of B. and W. unless with the previous written consent of the plaintiffs.

In 1912 the defendants, without obtaining such consent, laid a two-inch pipe, eighty-eight yards in length, from one of the mains in their own district along a street in the parish of W. in order to supply gas to one consumer. The plaintiffs, who were a limited company formed to supply gas in the parishes of B. and W., brought their action for an injunction to restrain the defendants from allowing this pipe to remain and from laying any pipes in the said parishes contrary to the proviso in the Act:—

Held (affirming the decision of Eve J. [1914] 1 Ch. 270), that the proviso in the Act of 1895 was limited in its operation to mains properly so called and distinct from service pipes; that the eighty-eight yards length of pipe was laid down and was being used as a service pipe only; and that the plaintiffs were not entitled to an injunction.

APPEAL from a decision of Eve J. (1)

The plaintiffs were a limited company registered in 1864 under the Companies Act, 1862, and now manufactured and supplied

(1) [1914] 1 Ch. 270.

gas in the parishes of Whittington and Brimington, in the county of Derby. The defendants were a board incorporated under the Chesterfield Gas and Water Board Act, 1895 (58 & 59 Vict. c. cxlvii.), for the purpose (among others) of acquiring the undertaking of the Chesterfield Waterworks and Gas Light Company. This company was originally incorporated by Act of Parliament in 1825 (6 Geo. 4, c. lxvi.) for the purpose of supplying gas within the town and borough of Chesterfield, and by the Chesterfield Waterworks and Gas Light Company's Act, 1855 (18 Vict. c. xxix.), the company was dissolved and re-incorporated for the purpose of manufacturing and supplying gas in Chesterfield and Newbold and other places; and by s. 12 of this Act the Gasworks Clauses Act, 1847, was incorporated with the Act of 1855. By the Chesterfield Waterworks and Gas Light Company's Extension Act, 1865 (28 Vict. c. xxxvi.), it was enacted by s. 5 that the Act of 1855 and the powers and provisions thereof should extend and apply to and include the parishes of Brimington and Whittington in such way and manner in all respects as if those places had been originally included within the limits, powers, and provisions of the Act of 1855, provided that it should not be lawful for the Chesterfield Company to extend their mains for the supply of gas in the parishes of Brimington and Whittington unless with the previous consent in writing of the Whittington Gas Company, Limited. By the Chesterfield Gas and Water Board Act, 1895, the defendants were incorporated and the undertaking of the Chesterfield Company and all their rights, powers, duties, and obligations were transferred to and vested in the defendants. By s. 4 of this Act it was provided that, subject to the provisions of that Act, the limits of that Act for the supply of gas and water should be the existing limits of the Chesterfield Company for the supply of gas and water respectively, (that was to say) the borough of Chesterfield, the district of the urban district of (among others) Whittington, and the parish of (among others) Brimington, "Provided that it shall not be lawful for the board to extend the existing mains of the company for the supply of gas in the parishes of Brimington and Whittington unless with the previous consent in writing of the Whittington Gas Company, Limited."

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By s. 42 of this Act the defendants were empowered to supply gas for the several purposes therein mentioned.

By s. 28 of the Chesterfield Gas and Water Board Act, 1911 (1 & 2 Geo. 5, c. xlv.), the limits of the defendants for the supply of gas were extended so as to include, in addition to the existing limits as defined by s. 4 of the Act of 1895, the several parishes therein mentioned; and it was provided that the defendants should have and might exercise within the said parishes all the powers conferred, and should be subject to all the obligations imposed by the Act of 1895 with reference to the gas undertaking. In November, 1912, the defendants, as the plaintiffs alleged, in contravention of the provisions of the Acts of 1895 and 1911, and without having obtained the previous consent of the plaintiffs, laid a two-inch pipe for the supply of gas running from and connecting with their existing main in Sheffield Road within the parish of Newbold under and along a street called Foundry Street in the parish of Whittington. This pipe, or extended main, as the plaintiffs alleged it to be, was eighty-eight yards in length, and supplied gas to a foundry in the occupation of one Green, who paid part of the cost of laying the pipe. The plaintiffs alleged that the defendants were supplying gas by means of this pipe within the parish of Whittington, and intended to do so unless restrained; and the plaintiffs accordingly claimed an injunction to restrain the defendants from allowing the said "extended main" to remain, or from laying any pipe or pipes in Foundry Street, or elsewhere in the parishes of Brimington and Whittington, so as to constitute an extension of any existing gas main of the defendants, in contravention of the provisions of the Acts of 1895 and 1911; a mandatory order; and damages.

The defendants pleaded that the pipe in question was a "service pipe," laid in lawful exercise of the powers conferred by the above-mentioned Acts, and was intended to provide for the supply of gas to one customer only (Green); and, further, that the pipe was not of any greater capacity than was required for the purposes of such supply. The gasworks of the defendants were at a distance of three miles from Foundry Street, and there was evidence that the two-inch pipe in question was

capable of supplying more gas than was at present required at the foundry. The defendants' fifteen-inch main in Sheffield Road was outside the boundary of the parishes of Brimington and Whittington, but they had another and older main in Sheffield Road, and two smaller mains in Duke Street and Chapel Street, all within the parish of Whittington, and by means of service pipes from these mains forty-three consumers were now being supplied in the parish of Whittington.

Eve J. dismissed the action, and the plaintiffs appealed.

Maugham, K.C., and *E. E. H. Brydges*, for the appellants. The eighty-eight yards pipe is not a service pipe, but a main, although at present gas is only supplied through it to one person. More gas can pass through it than is required by that consumer, and any one who has a house in Foundry Street within twenty-five yards of the pipe can insist on being connected with and supplied through it: Gasworks Clauses Act, 1871, s. 11. Therefore it is an extension of the main and a breach of the provisions of the private Acts of Parliament. No doubt the engineer who laid down the pipe intended to provide for the wants of one consumer only, but that is immaterial, and the learned judge ought not to have relied in his judgment on that intention. The fact is that this pipe can be used as a main. There are other two-inch mains in this parish, and even some of only one inch. There is no definition of the word "main" in any of the Acts of Parliament, but in these local Acts the word must be taken to mean the same as "pipe," otherwise their object, which was to prevent the supply of gas in the Whittington district without our consent, will be frustrated. The respondents will be able to run these so-called service pipes to any distance from their mains, and thus ruin our business. Even if this is a service pipe it is an extension of the main. To be an extension of a main it is not essential that the thing should itself be a main. A main can be extended by a pipe. It cannot be contended that the fact that the respondents are restricted from extending their mains is any evidence that this is not a main. It must be either a service pipe or a main. They are not allowed to make any sort of extension of their mains except such as the

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public had a right to demand. It is not sufficient to consider the present state of affairs; Green may give up the use of gas at any moment, and this pipe would then be able to supply many consumers.

Cave, K.C., and *Joshua Scholefield*, for the respondents, were not called upon.

COZENS-HARDY M.R. This is an appeal from a decision of Eve J., and it raises a short point upon the construction of an Act of Parliament. There are two Acts upon each of which the question might arise, but the language of the two sections is so absolutely identical that I think we need only deal with one.

The defendants, now a gas and water board, are the successors of a company who years ago obtained power to extend the limits of their Act to the two parishes of Brimington and Whittington, that is to say they had all the powers of a water undertaker within those two parishes in addition to their own district. But there was this proviso at the end of the Act: "Provided that it shall not be lawful for the board to extend the existing mains of the company for the supply of gas in the parishes of Brimington and Whittington unless with the previous consent in writing of the Whittington Gas Company, Limited." This is an application for an injunction by the Whittington Gas Company, and it alleges that the defendants have extended the existing mains of the company within those two parishes without their previous consent in writing.

First of all what is the meaning of this proviso? It seems to me quite plain that there is a distinction between mains and service pipes: it is not "not to extend any pipes of the company," nor "any pipes for the supply of gas," but, "the mains of the company for the supply of gas." It may be difficult to determine that which after all is primarily a question of fact, whether the particular pipe is or is not a main, but I altogether decline to accept the view that this is a proviso which prevents the company from doing anything in either of those parishes without the written consent of the plaintiffs except supplying a new customer whom they are under a legal obligation to supply. In short, to give a concrete instance, I can see nothing to prevent the

defendants from supplying customers with gas within twenty-five yards from an admittedly existing main provided they do it by means of a pipe which is not or is held not to be one of the company's mains.

In the present case what happened was this: here are two mains in what is an important road, Sheffield Road, a fifteen-inch main and a six-inch main; there is a small street called Foundry Street opening out of the Sheffield Road, and some way down that street, at a distance of eighty-eight yards, there is a foundry which desires to obtain gas, not for lighting purposes but for power. It is a foundry and requires power, and gas engines have been erected for the purpose, and a two-inch pipe has been put down from the admitted main in Sheffield Road to Green's foundry. Now is that or is it not a main or an extension of a main within the meaning of the section? It is found that it is not more than reasonably sufficient for what now is, or what may reasonably be contemplated as being, necessary for the purpose of Green's foundry to which it goes. That is a finding of fact for which there is ample evidence and which we cannot in any way challenge. But it is said, at the present moment at all events, there might be a surplus not required for power and the lighting of Green's foundry, and the margin over that which is requisite at the present moment might be available for lighting houses in Foundry Street; and in that sense it is said this two-inch pipe coming down there is or may be a main, and if it is a main it is contrary to the provisions of the Act. In the first place I feel no doubt at all that the prohibition does not apply to a service pipe, if it be a service pipe and only a service pipe connected with a main. I think it would be absurd to call a service pipe, connected with the main for the supply of a house, an extension of a main: it is nothing of the kind, it is merely something which is used to tap a main and to convey the gas from the main to the dwelling-house. It is proved here, and the learned judge finds it as a fact, that this was in the intention of the parties a mere service pipe and has not been used and at the present moment cannot conveniently be used for any other purpose. The burden of proving that this is an extension of the main must, of course, lie on the plaintiffs in this action. I have

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listened to the arguments for the appellants and am not satisfied that they have established that which is the point and only point in the case. If they are right in the main proposition which they put forward, namely, that the proviso has the effect of a prohibition to supply any new customer whom they are not bound to supply, that may carry them the whole way; but short of that it seems to me their case is hopeless. The learned judge has found that it is not a main, there is ample evidence to justify his so finding, and that being so, it seems to me the view he took is absolutely right and that this appeal fails and must be dismissed with costs.

SWINFEN EADY L.J. I am of the same opinion, and I concur entirely in the judgment of Eve J. in the Court below.

I am of opinion as a matter of construction that the Act means exactly what the language would prima facie convey, the company were not to extend their existing mains: it does not mean that the company were prohibited from making further connections with those existing mains or further connections except of the character of those already made: it means exactly what it says, they are not to extend their existing mains. Now "extend" is a word appropriate to a main but not appropriate to a service pipe. Reliance was placed on the language of the Act that they were "not to extend their mains for the supply of gas in the parishes of Brimington and Whittington"; but those words "for the supply of gas" really only mean they were not to extend their gas mains. The Act had reference both to gas and water, and this prohibition against extension was referring to gas only and not water, hence the use of the language "It shall not be lawful for the company to extend their mains for the supply of gas." Then the learned judge has found as a matter of fact that the pipe in question which has been laid from the old main to Green's foundry is a service pipe and not a main. I entirely agree with that conclusion. There was evidence upon which he could properly arrive at that decision, and upon that evidence I should have arrived at exactly the same conclusion: it is a service pipe and it is not a main at all. The purpose and object of this two-inch wrought iron pipe

which has been laid is to bring gas from the main and supply Green's foundry with it. There is nothing in either of the statutes to which reference has been made which prevents the defendants from laying that pipe, and the appeal fails.

PICKFORD L.J. I am of the same opinion. I am by no means clear that if they had thought of it those who obtained this proviso for the protection of the plaintiff company would not have included a case of this kind, but the question is whether the words of the proviso do include such a case, and I do not think they do. To extend the mains means that it must be done by a thing which is a main; it must be an extended main and the extension of the original main must be in itself a main. There is no doubt that the difference and distinction between mains and service pipes were perfectly well known at the time when this Act of Parliament was passed. I do not know that the Gasworks Clauses Act, 1847, used the word "main," but it certainly used the words "service pipe," and the Metropolis Gas Act of 1860 used the word "main" and also the word "pipe"; I think the distinction between the two was perfectly well known, and when this proviso spoke of extending the main it meant extending it by something which in itself would be a main, and applied to a main only.

The only other question is whether this was a main or service pipe. The learned judge has found as a fact (and it must in every case, I think, be a question of fact) that it was a service pipe. It is said he has misdirected himself because he has taken into account only the intention of the person who put down this pipe. I do not think he has taken that view, but he has taken the view which I think is the correct one, that in order to ascertain whether it is a service pipe or not you must look at the purpose for which it was laid down, the circumstances under which it was laid down, and the nature of the pipe itself. I agree it would not be sufficient for the man who laid it down to say "I only intended it as a service pipe" if in fact all the other circumstances which I have mentioned pointed in the direction of its being a main. But in this case it was put down at the request of a single consumer and intended to take the gas from

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the undoubted main, the fifteen-inch main in Sheffield Road: and as put down, according to the evidence of the gas manager of the defendants, which the judge accepted, it was of such a nature that in his opinion it was sufficient for that purpose and not sufficient for general purposes of supply. There was also evidence given by a witness who was called for the plaintiffs that a two-inch main at the present time is a very unusual thing, whereas a two-inch service pipe is a very common thing indeed. There was clearly evidence upon which the judge could find that this was in fact, taking everything into consideration, a service pipe, and I cannot see any reason for differing from his finding of fact.

I agree therefore that the appeal must be dismissed.

Solicitors: *Cooper & Co., for Davies, Sanders & Swanwick, Chesterfield; Stevens, Son & Parkes, for Jones & Middleton, Chesterfield.*

H. C. R.

JOYCE J. 1914 *Jan.* 20, 21, 22; *March* 5.

ATTORNEY-GENERAL *v.* THE GOVERNORS AND GUARDIANS OF THE HOSPITAL FOR THE MAINTENANCE AND EDUCATION OF EXPOSED AND DESERTED YOUNG CHILDREN (COMMONLY CALLED THE FOUNDLING HOSPITAL).

[1910 A. 341.]

Charity—Incorporation by Royal Charter in 1739—*Voluntary Contributions—Investment in Land—Gift of Land without Expression of Trust—"Endowment"—Charity "maintained partly by voluntary subscriptions and partly by income arising from endowment"—Power of Disposition—Exemption from "Jurisdiction or control of the said board or the powers or provisions" of the Act—Charitable Trusts Act*, 1853 (16 & 17 *Vict.* c. 137), *ss.* 62, 66—*Charitable Trusts Amendment Act*, 1855 (18 & 19 *Vict.* c. 124), *ss.* 29, 48.

The charity, commonly called the Foundling Hospital, was incorporated in 1739 by Royal Charter with power to purchase, hold, sell, demise, and dispose of land of any tenure. In the same year the Charter was confirmed by Act of Parliament. In 1750 the governors of the charity purchased land in Bloomsbury which was conveyed to them without the expression of any trust. The purchase price was

paid out of moneys in the hands of the governors representing voluntary contributions, in obtaining which there had undoubtedly been some idea that the governors should not immediately spend all they received but should make investments, as and when possible and expedient, in property producing income for the maintenance of the charity, but nevertheless the contributions so obtained were such that they might have been expended as income, or in whatever manner the governors pleased for the purposes of the charity. On part of this land the Foundling Hospital was subsequently built, the chapel being the subject of a special subscription, and the rest of the land was developed under long building leases.

The yearly rentals received from the Bloomsbury estate at the present time were very considerable, but for some time past the yearly subscriptions, irrespective of donations and benefactions, had only averaged eleven guineas.

In 1744 certain property in the city of London had been conveyed by the donors to the governors of the hospital without the expression of any trust.

In an action by the Attorney-General for a declaration that the governors of the hospital could not deal with the Bloomsbury estate or City property except in accordance with the provisions of s. 29 of the Charitable Trusts Amendment Act, 1855:—

Held, that, upon the evidence, the charity was at the time of the passing of the Charitable Trusts Act, 1853, and had ever since been, supported in part—though possibly to a comparatively small extent—by voluntary subscriptions and, consequently, was a charity "maintained partly by subscriptions and partly by income arising from endowment" to which the exemption in respect of donations and bequests contained in the latter part of s. 62 of that Act applied; that, therefore, the charity was, by virtue of s. 48 of the Charitable Trusts Amendment Act, 1855, exempted from the operation of s. 29 of the latter Act; and that, in the circumstances, the Bloomsbury estate, whether called endowment or not, was exempt from the jurisdiction or control of the board and from the provisions of the Act of 1855 as well as of the Act of 1853.

Held, further, following *In re Corporation of the Sons of the Clergy and Skinner* [1893] 1 Ch. 178, that there was no material difference in point of law between the position of the City property and the Bloomsbury estate.

In re Church Army (1906) 94 L. T. 559; 75 L. J. (Ch.) 467 applied.

ACTION upon an information by the Attorney-General against the governors and guardians of the Foundling Hospital for a declaration that the lands vested in the Foundling Hospital, and particularly fifty-six acres of land in the parishes of St. Pancras, St. Andrew, Holborn, St. Giles-in-the-Fields, and St. George, Bloomsbury, in the county of London, and the buildings thereon,

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and certain land and buildings in Sugar Loaf Court and Garlick Hill, in the city of London, could not be sold, granted, demised, exchanged, or disposed of under the charter of the Foundling Hospital or under the Act of 1739 confirming the same, or under the Foundling Hospital Act, 1885, except in accordance with the provisions of s. 29 of the Charitable Trusts Amendment Act, 1855.

The facts were as follows :—

As the result of a petition presented by Thomas Coram in 1773 and supported by three memorials the signatories to which stated that they were desirous to encourage and willing to contribute towards the erection and supporting of a hospital for exposed and deserted young children, a Royal Charter was on October 17, 1739, granted by His Majesty King George II. whereby the several persons there n named and such others as should from time to time be elected in the manner therein directed, and their successors, were for ever thereafter constituted one body politic and corporate in deed and in name by the name of "The Governors and Guardians of the Hospital for the Maintenance and Education of Exposed and Deserted Young Children" (hereinafter called "the Foundling Hospital") with perpetual succession, and with power, notwithstanding the Statute of Mortmain, to purchase, have, take, receive, and enjoy to them and their successors, manors, messuages, lands, rents, tenements, annuities, and hereditaments of whatsoever nature or kind, in fee and perpetuity, or for terms of life or years, not exceeding the yearly value of 4000*l.* beyond reprizes, so far as they were not restrained by law; and all manner of goods, chattels, and things whatsoever, of what nature or value soever, for the better support and maintenance of such poor deserted children as should be received into the said hospital in manner hereinafter mentioned; and with power also to sell, grant, demise, exchange, and dispose of any of the same manors, messuages, lands, and tenements, whereof and wherein they should have any estate of inheritance, or for life, lives, or years as aforesaid, and to sue and be sued and have and use a common seal. The Charter also contained provisions relating to the appointment of president, vice-presidents, and treasurer, the holding of meetings

and making of rules and by-laws, the election of governors and guardians, the taking of subscriptions, and the collection of such moneys as should be contributed for the purposes of the hospital and the keeping of accounts.

By an Act of Parliament (13 Geo. 2, c. 29), being an Act for confirming and enlarging the powers granted by the Charter and hereinafter referred to as "the Act of 1739," it was (inter alia) enacted that the Foundling Hospital should have power by any instrument under their common seal to contract for or to purchase any lands, tenements, or hereditaments provided the same did not exceed the value of 4000*l.* a year in fee, beyond reprizes, or to take or purchase for any term or terms of years, or as tenants, from year to year, or at will, any lands or tenements whatsoever, to hold and enjoy the same, and to erect any house or houses, building or buildings thereon, or to convert any house or houses, building or buildings, which they should so purchase or hire for that purpose, to be an hospital or hospitals for the reception of poor and exposed children, in such manner as to the Foundling Hospital should seem meet.

At first the hospital was carried on in a hired house in Hatton Garden, but subsequently the Foundling Hospital purchased from the Earl of Salisbury certain lands containing fifty-six acres or thereabouts situate in the parishes of St. Pancras, St. Andrew, Holborn, St. Giles-in-the-Fields, and St. George, Bloomsbury (hereinafter referred to as "the Bloomsbury estate"), for the sum of 7000*l.*, whereof the sum of 500*l.* was subscribed by the Earl himself, and the balance of 6500*l.* was derived from donations and subscriptions, and by indentures of lease and release dated January 20 and 21, 1741—2, the lands were conveyed to the Foundling Hospital without the expression of any trust, the habendum being in the following words: "To have and to hold the said two closes of land hereby granted and released or meant or mentioned or intended so to be and every part and parcel thereof with their and every of their appurtenances (except as before excepted) unto the said governors and guardians of the said Hospital for the Maintenance and Education of Exposed and Deserted Young Children and their successors to the only proper use and behoof of the

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said governors and guardians their successors and assigns for ever."

On part of the lands so purchased the present hospital and the buildings connected therewith were erected and a further portion was appropriated for gardens and grounds in connection with the hospital, and ultimately the whole of the remaining lands, including Brunswick Square, Mecklenburg Square, Great Coram Street, Compton Street, and part of Guilford Street, were developed by demising the same on building leases for ninety-nine years or thereabouts at ground rents.

Up to the date of the purchase of the Bloomsbury estate from Lord Salisbury over 10,000*l.* was in the hands of the governors of the Foundling Hospital, derived from donations, annual subscriptions, and legacies free from any condition or trust or liability to purchase land or build. With regard to a further sum of 1745*l.*, of which only 895*l.* had been received at the date of the conveyance, there appeared in one of the books of the hospital an interlineation to the effect that the same was "For land and building," but beyond this mere statement there was no evidence by whom or why the interlineation was made and nothing to indicate anything like an allocation by any of the subscribers. The purchase-money for the Bloomsbury estate was paid out of the proceeds of sale of 4000*l.* South Sea Annuities and cash in hand.

Certain property situate at Garlick Hill and Sugar Loaf Court in the city of London (hereinafter referred to as "the City property") was purchased in October, 1744, for 770*l.* by John Milner and Taylor White, who in November of the same year by a voluntary conveyance conveyed the property to the governors of the Foundling Hospital to the use of them, their successors and assigns, for ever and to and for no other use, interest or purpose whatsoever. It was not known from what source the purchase-money for this property was derived, but there was no trace in the accounts of any part of it having been paid out of the funds of the Foundling Hospital.

The west wing of the hospital was completed in 1745 and the east wing in 1752. Subsequently a chapel was built, which was the subject of a special subscription for that particular purpose.

From the years 1756 to 1771 (both inclusive) the Foundling Hospital received parliamentary grants amounting in the aggregate to 549,796*l.* 6*s.* for the purpose of receiving all such children under a certain age as should be brought to the hospital and of maintaining and educating them. During this period the expenses of maintaining, educating, and apprenticing the children came to 525,115*l.* 9*s.* 10*d.* or thereabouts, and the charity had also expended sums amounting to 39,027*l.* or thereabouts in establishing homes for the maintenance, education, and placing out of children in the country. These homes were ultimately sold and the proceeds applied in maintaining the hospital.

In the year 1749 the yearly subscriptions to the hospital amounted to about 700*l.*, but from that time onward the yearly subscriptions decreased. In 1855 the governors bought thirty years annuities bringing in 4000*l.* per annum, and when these expired in 1885 the governors sought to raise 50,000*l.* by mortgage of some of the Bloomsbury estate. Objection was taken to their power to mortgage on the ground that the proposed dealing with their real estate was prohibited by certain statutes of Elizabeth, and to meet this objection the governors obtained the private Act of Parliament next hereinafter mentioned.

By the Foundling Hospital Act, 1885 (48 & 49 Vict. c. vi.), after reciting (inter alia) the enactment of three Acts of Parliament of the thirteenth, fourteenth, and eighteenth years of Elizabeth (13 Eliz. c. 10, 14 Eliz. c. 14, and 18 Eliz. c. 11) creating restrictions upon the powers of (inter alia) guardians of hospitals to make sales and leases of land, and that the Bloomsbury estate was purchased with moneys received by the Foundling Hospital in donations and subscriptions, and that various conveyances on sale and leases of land had been made by the Foundling Hospital as therein mentioned in reliance on the express terms of the Charter and notwithstanding the restrictions imposed by the above-mentioned Acts of Elizabeth, and that it was expedient that the several conveyances and leases scheduled to the Act and also all sales, grants, demises, exchanges, and dispositions to be effected by the Foundling Hospital in accordance with the terms of the Charter should be confirmed and made valid, it was (inter alia) enacted

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that, notwithstanding anything contained in the three Acts of Elizabeth or any other law or statute to the contrary, the scheduled conveyances and leases, and also every sale, grant, demise, exchange or disposition, or other act or thing made or done or purporting to be made or done after the passing of that Act pursuant to and in accordance with the terms and provisions of the Charter, should be deemed to be and to have always been and should be as valid in law and of the same force and effect in all respects as if the said three recited Acts of the thirteenth, fourteenth and eighteenth years of Elizabeth had never been passed. The Act also provided that that Act or anything therein contained should not operate to make valid any sale, grant, demise, exchange or disposition, or any other act or thing purporting to be made or done by virtue of the Charter, further or otherwise than the same would have been valid under the Charter in case the said three Acts of Elizabeth had never been passed. The marginal note opposite to this last provision was: "This Act not to make valid any Act not authorised by the Charter."

From the year 1881 down to the present the yearly "subscriptions"—as distinguished from benefactions, donations, and legacies—had averaged about eleven guineas. The amount of benefactions and donations varied very considerably from year to year, in some few years being less than 100*l.* and in other years running into several hundreds. The late Queen Victoria gave an annual "benefaction" of fifty guineas every year from 1858 down to her death. In consequence of the expiration during the latter part of the nineteenth century of the original building leases the rental derived from the Bloomsbury estate had largely increased, and at the present time the gross yearly rentals from this source amounted to about 27,000*l.*

The necessity for the present action arose by reason of the requirement of the registrar in the office of the Land Registry that a restriction should be entered against the land of the Foundling Hospital that it was not to be sold without the consent of the Board of Education, who had taken the place of the Charity Commissioners under the Charitable Trusts Act, 1853, by virtue of the Board of Education Act, 1899, s. 2, and of

the Board of Education (Powers) Orders in Council, 1900 to 1902.

Sir S. O. Buckmaster, *S.-G.*, *Tomlin*, *K.C.*, and *Austen-Cartmell*, for the plaintiff. The question to be determined in this case is whether the Foundling Hospital, who admittedly are a charity, are exempt under s. 62 of the Charitable Trusts Act, 1853, in respect of their Bloomsbury estate and City property, from the provisions of that Act. They cannot contend in this Court that they are exempt by reason of s. 29 of the Charitable Trusts Amendment Act, 1855: *Attorney-General* v. *National Hospital for the Relief and Care of the Paralysed and Epileptic*. (1)

Exemption under s. 62 (2) from the provisions of the statute with regard to real estate is divisible into two cases—(1.) where the charity is maintained wholly by voluntary contributions; and (2.) where the charity is what is known as a mixed charity, namely, maintained partly by income from endowments and partly by voluntary subscriptions. The Foundling Hospital cannot in the circumstances come under the first case, and,

(1) [1904] 2 Ch. 252.

(2) The material provisions of s. 62 of the Charitable Trusts Act, 1853, are as follows: ". . . . and where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said Board, or the powers or provisions of this Act; and no portion of any such donation or bequest as last aforesaid, or of any voluntary subscription, which is now or shall or may from time to time be set apart or appropriated and invested by the governing or managing body of the charity, for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with such charity, in pursuance of any rule or resolution made or adopted by the governing or managing body of such charity, or of any donation or bequest in aid of any fund so set apart or appropriated for any such object or purpose as aforesaid, shall be subject to the jurisdiction or control of the said Board or the powers or provisions of this Act . . . . "

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therefore, unless the charity can bring itself within the second class, it cannot be entitled to exemption. If it is a mixed charity, it can claim exemption in respect of real estate purchased by money which could have been used either for purposes of capital or income. This result has been effected by several decisions, of which the first was *In re Clergy Orphan Corporation* (1), in which Davey L.J. differed from the reasons of Romilly M.R. in *Governors of the Charity for the Relief of Poor Widows and Children of Clergymen* v. *Sutton.* (2) In *In re Clergy Orphan Corporation* (1) the charity was maintained partly by moneys arising from investments and partly by voluntary subscriptions, the investments having been acquired with money which could have been used for the purposes of income; and it was held that land so purchased as an investment was exempt from the provisions of the Act. That case was explained in *Attorney-General* v. *Mathieson* (3), and applied in *In re Orphan Working School and Alexandra Ophanage's Contract.* (4) The effect of those decisions appears to create this inconsistency, that real estate so purchased, although coming within the definition of "endowment" in s. 66 (5) is exempt from the provisions of the statute.

Therefore, in limine, the question is whether on the facts of the case this is a mixed charity by reason of its being maintained partly by voluntary subscriptions. We submit that it is not a mixed charity, and for the following reasons: The annual expenditure of the charity does not appear to equal the income derived from its real estate, while for years past its annual subscriptions have not amounted to more than eleven guineas. In view of these facts, it is not possible to say that the charity is maintained partly by income from endowment and partly by voluntary

(1) [1894] 3 Ch. 145.
(2) (1860) 27 Beav. 651.
(3) [1907] 2 Ch. 383.
(4) [1912] 2 Ch. 167.
(5) Sect. 66 provides: "In the construction of this Act, except where the context or other provisions of the Act may require different construction . . . . the expression 'endowment' shall mean and include all lands and real estate whatsoever, of any tenure, and any charge thereon, or interest therein, and all stocks, funds, monies, securities, investments, and personal estate whatsoever, which shall for the time being belong to or be held in trust for any charity, or for all or any of the objects or purposes thereof."

contributions. Sect. 62 never contemplated, and does not deal with, a charity that derives the whole of its annual income from invested property. The case of such a charity was adverted to by Davey L.J. in *In re Clergy Orphan Corporation* (1), and he seemed to think that such a charity was not a mixed charity and was not within the exemption. The whole of this purchased property is an "endowment" within the definition of that term in s. 66 of the Act. The latter part of s. 62 exempting certain donations and bequests does not benefit this particular charity, because the only charity contemplated is "any such charity as last aforesaid," that is, a mixed charity, and this charity, we submit, is not a mixed charity.

Further, we submit that inasmuch as the sum of 895*l.*, over and above the 500*l.* contributed by the Earl of Salisbury, formed part of the purchase-money paid for the Bloomsbury estate, and was given for the specific purpose of buying that property, it is not possible now to disentangle those moneys and say that part is endowment and part not.

The Foundling Hospital Act, 1885, does not help the claim of the charity to exemption. It was passed to meet the difficulty occasioned by the statutes of Elizabeth, and having done that it relegated the charity to its rights and powers under the Charter and in no way affected the question now before the Court.

Moreover, we submit that in the circumstances the charity has for more than a century permanently dedicated this property as capital and cannot now say that it is applicable as income. In support of this view it is a significant fact that in all the lean years before the freehold reversions fell in and when the charity was hard pressed for money it was never suggested that the Bloomsbury estate should be sold.

The onus is on the defendants to shew that the Bloomsbury estate was bought with money applicable for the general purposes of the charity and that the proceeds can be used for the general purposes of the charity to-day.

The City property was presented to the charity by the men who bought it, and we submit that the charity cannot sell this property and treat the proceeds as income.

(1) [1894] 3 Ch. 145, 154.

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The chapel was built with moneys specially contributed for that particular purpose, and, with its appurtenances, covers a site of ten acres out of the fifty-six. The charity cannot certainly claim an exemption in respect of that, and we submit that it is impossible to differentiate between those ten acres and the rest of the property.

Hughes, *K.C.*, *Younger*, *K.C.*, and *T. T. Methold*, for the defendants. The defendant charity is entirely exempt from the control or assistance of the Board of Education.

The Foundling Hospital Act, 1885, was a recognition by Parliament that all that had been done under the Charter was regular, subject only to the question of the statutes of Elizabeth which the Act was intended to meet and set at rest. Sect. 2 of the Act amounts to an enactment that all subsequent dealings in accordance with the Charter shall be valid in law. There was no suggestion that the control or consent of the Charity Commissioners was necessary. The sales and leases scheduled to the Act shew clearly that, so far from dedicating the property to capital as suggested by the Solicitor-General, the governors have from time to time sold or dealt with the property and applied the proceeds for the general purposes of the charity. The Bloomsbury estate was bought from the Earl of Salisbury out of voluntary contributions, and there is really no evidence whatever that any part of those contributions was appropriated to or affected with any special trust of any kind; nor was there any trust declared with regard to the City property, and the same is available for the general purposes of the charity.

The evidence shews that the defendant charity is in fact a mixed charity, inasmuch as it is maintained partly by voluntary subscriptions and partly by income arising from endowment in the widest sense of that term. It may be true that the annual subscriptions are small, but there are also the annual benefactions and donations to be considered; and it is not true to say, as the Solicitor-General has suggested, that because the annual income from the real estate may exceed the yearly expenditure the Charity is not maintained by voluntary subscriptions any more than it is true to say that a man whose private income is 5000*l.* per annum and whose professional income is another 5000*l.* per annum,

and who does not spend more than 5000*l.* a year, is not maintained by his professional income because his private income was equal to his expenditure, or vice versa. What Davey L.J. said in *In re Clergy Orphan Corporation* (1) about a charity maintained wholly by income derived from general voluntary donations invested and capitalized was obiter. Romilly M.R. in *Governors of the Charity for the Relief of Poor Widows and Children of Clergymen* v. *Sutton* (2) seemed to think that "endowment" in s. 62 was not to be read in such an extremely general form as is stated in s. 66, for the latter section begins with the words "The construction of this Act, except where the context or other provisions of the Act may require a different construction," and we submit that in s. 62 a different construction is required.

The question of "endowment" and voluntary contributions was considered by Neville J. in *In re Society for Training Teachers of the Deaf and Whittle's Contract.* (3) In that case it was held that the property purchased with money applicable for general purposes was exempt, and there was much less ground for exemption than in this case.

The latter part of s. 62 enlarges the exclusion or exemption from the provisions of the Act, and extends to any donation or bequest of which no special application or appropriation shall be directed or declared by the donor or testator, and also to donations or bequests to any fund set apart or appropriated by the governors for any particular object. Having regard to the latter part of s. 62, it is very difficult to answer the question put by Davey L.J. in *In re Clergy Orphan Corporation* (1) otherwise than by saying that in considering the meaning of the words "maintained partly by voluntary subscriptions and partly by income arising from any endowment" you must have regard to the exemption shewn by s. 62 itself—that is to say, the right to claim the exemption must extend to every case where the property is exempted, when it would be exempted if the charity had the right to claim exemption.

The exemption of a donation to a fund set apart or appropriated for a specific purpose contained in the latter part of

(1) [1894] 3 Ch. 145, 154. (2) 27 Beav. 651.
(3) [1907] 2 Ch. 486.

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s. 62 would extend to the 895*l.* which it has been suggested was given for the purpose of buying the Bloomsbury estate. But even if that sum were composed of subscriptions or donations given in answer to an appeal for the purpose of purchasing the land or building the hospital, there is no ground whatever for supposing that any one of those donors gave the money on condition that it was to be used only for that purpose, which was only one of the purposes of the charity. There is nothing in the special allocation of the money for that particular purpose to shew that it was to be treated as capital and not as applicable to current expenses. *In re Church Army* (1) is an authority closely in point and shews that the mere fact that a subscriber allocates his subscription or donation to a particular object, which is the immediate object for which the subscription is being asked, is not a "special application or appropriation" "directed or declared by the donor or testator," and that the money can, if the governors think fit, be applied for general purposes. *Attorney-General* v. *Mathieson* (2) and *In re Orphan Working School and Alexandra Orphanage's Contract* (3) contain observations to the same effect. Having regard to those cases, this sum of 895*l.* and the money given for the building of the chapel are in the same category with the other donations and subscriptions given for general purposes and do not affect the question of exemption.

The City property was obviously a gift for the ordinary purposes of the charity and is exempt from the provisions of the Act: *In re Corporation of the Sons of the Clergy and Skinner.* (4)

Sir S. O. Buckmaster, S.-G., in reply.

Cur. adv. vult.

March 5. JOYCE J. This is an action upon what we are used to call, very conveniently, an information by the Attorney-General ex officio against the governors and guardians of what we know as the Foundling Hospital asking for a declaration that the lands vested in the defendant corporation, the hospital, for

(1) 94 L. T. 559; 75 L. J. (Ch.) 467.
(2) [1907] 2 Ch. 383.
(3) [1912] 2 Ch. 167.
(4) [1893] 1 Ch. 178.

the purposes of their charity, and particularly the Bloomsbury estate and the City property, cannot be sold, granted, demised, exchanged, or disposed of under the Charter of 1739, or under the Act of 1739 which confirmed the Charter, or under the Foundling Hospital Act of 1885, except in accordance with the provisions of s. 29 of the Charitable Trusts Amendment Act of 1855.

This charity was constituted in the year 1739 by a Royal Charter which gave various powers (I need not go through them in detail) as to the purchasing and holding of lands and so on; and power "to sell, grant, demise, exchange, and dispose of any of the same manors, messuages, lands, and tenements, whereof and wherein they shall have any estate of inheritance, or for life, lives, or years, as aforesaid"—the point of that being that there is a distinct power to sell in the Charter constituting the Charity.

In the ordinary sense of the term, this is not an endowed charity. It has, I will not say capital—that is an ambiguous term—but real estate which has now become very valuable, the whole of which, with one exception which will be mentioned presently, was purchased out of contributions in money made to the charity, contributions which upon the evidence, in my opinion, might have been expended as income or in whatever manner the governors pleased for the purposes of the charity, although no doubt, and this must be admitted, in obtaining contributions generally there was an idea that the governors of the charity should not immediately spend everything they got, but if possible make investments as and when it might be found possible and expedient to do so in property producing income for the maintenance of the charity.

The principal investment made by the governors was the purchase of their Bloomsbury estate, bought in some year before 1750 of the Earl of Salisbury for 7000*l.*, and now producing a considerable net income as well as comprising the land utilized in part as the site of the hospital buildings, including the chapel. There is also some property in the City which I may call the City property, purchased in 1744 for between 700*l.* and 800*l.* and at once presented by the purchasers to the charity without any special, or indeed any express, trust being imposed. This

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constitutes the exception I mentioned just now. I may observe that this giving of land to the charity is very similar to what happened in the case of *In re Corporation of the Sons of the Clergy and Skinner* (1), where it was held by North J. that the consent of the Charity Commissioners to a sale was not necessary in the case of some land which had in effect been presented to the charity as land. I should also mention that the governors erected a chapel many years ago at a cost of some thousands of pounds, and there is evidence that the money was contributed nominally towards the expense of the erection of this building. The case of *In re Church Army* (2), before the Court of Appeal, was referred to in the argument as furnishing, as it does, an instance of a very similar proceeding. (See also the case before Parker J. of *In re Orphan Working School and Alexandra Orphanage's Contract.* (3)).

In 1853 an Act called the Charitable Trusts Act, 1853, was passed with the object of providing for the better administration of charitable trusts. Sect. 66 of that Act, the interpretation clause, enacts, amongst other things, that "the expression 'endowment'"—of course, this is only for the purpose of the Act—"shall mean and include all lands and real estate whatsoever, of any tenure, and any charge thereon, or interest therein, and all stock, funds, monies, securities, investments, and personal estate whatsoever, which shall for the time being belong to or be held in trust for any charity, or for all or any of the objects or purposes thereof." Then in s. 62, which is rather a long section, of the same Act we find this: "Where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment"—here "endowment" means endowment as interpreted by s. 66—"the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof;"—then there is this further provision, really a separate enactment—"and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or

(1) [1893] 1 Ch. 178. (2) 94 L. T. 559; 75 L. J. (Ch.) 467.
(3) [1912] 2 Ch. 167.

appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions shall be subject to the jurisdiction or control of the said Board, or the powers or provisions of this Act; and no portion of any such donation or bequest as last aforesaid, or of any voluntary subscription, which is now or shall or may from time to time be set apart or appropriated and invested by the governing or managing body of the charity, for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with such charity, in pursuance of any rule" and so on "shall be subject to the jurisdiction or control of the said Board or the powers or provisions of this Act."

Now, giving the widest possible meaning to the term "endowment" as interpreted by s. 66, it appears to me upon the evidence in the present case, and I found my judgment upon the fact, that at the time of the passing of the Act of 1853 this charity was and has ever since been supported in part (it may be to a comparatively small extent) by voluntary subscriptions. Consequently, if I am right as to this, the charity is at least one of those maintained partly by voluntary subscriptions and partly by income arising from "endowment" in the sense in which that term is used in the Act, so that the subsequent provision in s. 62 is applicable, the one I read last: "No donation or bequest" and so on not particularly appropriated or invested and so on "shall be subject to the jurisdiction or control of the Board" and so on. I need not read the words again.

In the Act of 1853 there is no prohibition or restriction upon charities selling or leasing. Soon afterwards, however, came the Act of 1855 containing s. 29, whereby it was provided: "It shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant, otherwise than with the express authority of Parliament, under any Act already passed or which may hereafter be passed, or of a Court or judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the Board, any sale, mortgage, or charge of the charity estate, or any lease thereof in reversion

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after more than three years of any existing term, or for any term of life, or in consideration wholly or in part of any fine, or for any term of years exceeding twenty-one years." That is the section upon which this information is founded. Then by s. 48 of the same Act this is provided: "In the construction of the principal Act and this Act the word 'charity' shall include every institution in England or Wales endowed for charitable purposes, but shall not include any charity or institution expressly exempted from the operation of the Act of 1853." Therefore if this charity is exempted from the operation of the Act of 1853 it is exempted from the operation of the Act of 1855, including s. 29.

Now, referring to the provision or saving clause in s. 62 of the Act of 1853 already stated, it appears to me, although the governors had invested in land a considerable part of their funds derived from voluntary and unfettered contributions (and it makes not the slightest difference for this purpose whether the investment was in land or stocks, including gilt-edged securities), that every such investment in land, whether called endowment or not, was and is exempt from the jurisdiction or control of the Board and from the provisions of the Act of 1855 as well as that of 1853, and, having regard to what is said in the case of *In re Corporation of the Sons of the Clergy and Skinner* (1), there is no material difference in point of law between the position of the Bloomsbury property and the City property of the charity.

Then there are certain statutes of Elizabeth (I need not go through them in detail, they are recited in the Act of 1885) imposing restrictions with reference to leases and so on of the charity lands, and in or prior to 1885 some one, presumably a very careful conveyancer, I suppose, suggested that this charity was subject to the provisions of these statutes of Elizabeth. Probably they had been forgotten up to that time in connection with this charity. Thereupon the charity applied for and obtained their Act of 1885, which recites these statutes of Elizabeth and various other matters of importance, amongst others that the Bloomsbury estate was purchased "with moneys received by the corporation in donations and subscriptions" and so on, a statement in the recital of a private Act of Parliament which, if it

(1) [1893] 1 Ch. 178.

were not otherwise proved, is ample evidence for all purposes, and then it recites that a portion of the said land was appropriated for gardens and so on. Then it recites leases and sales and that the governors, relying on the express terms of the Charter, by force of those express terms were enabled to dispose of their lands in manner authorized by the Charter without reference to the Acts of Elizabeth. Then the recital refers to doubts having been entertained and so on. Then it is provided that, "Notwithstanding anything contained in the three hereinbefore recited Acts" of Elizabeth "or any other law or statute to the contrary the several conveyances and leases the short particulars whereof are contained in the schedule"—those are leases which had been made without reference to the Acts of Elizabeth—"shall be as valid in law and of the same force and effect in all respects as if the said three recited Acts of Elizabeth had never been passed." Then comes the fourth clause: "Provided always that this Act or anything herein contained shall not operate to make valid any sale, grant, demise, exchange or disposition or any other act or thing purporting to be made or done by virtue of the said Charter further or otherwise than the same would have been valid under the said Charter in case the said three recited Acts . . . . of Queen Elizabeth had never been passed." My opinion of that section is that it simply means, or was intended to mean, really what is stated in the marginal note—I do not say because it is the marginal note—that this Act was not to make valid any Act not authorized by the Charter. It seems to me in fact, and I have no doubt, that that Act was supposed to set everything right and was enacted upon the basis that the charity could under the terms of their Charter and by force thereof make the sales and grant the leases referred to.

So far as I understand, no one suggested or thought—indeed it was not supposed until long afterwards—that s. 29 of the Act of 1855 had any operation with respect to a charity constituted by Royal Charter containing a full power of sale. In the case of *In re Mason's Orphanage and London and North-Western Ry. Co.* (1)—which involved the question whether a deed founding a

(1) [1896] 1 Ch. 596.

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charity was a scheme legally established within s. 29 of the Charitable Trusts Amendment Act, 1855, the point being whether a certain scheme gave a sufficient authority for a sale, and in which it was held that the instrument founding the charity was not a scheme within the meaning of the terms of the section—Kay L.J., giving judgment, expressly excepts, in the opinion he gave, charities constituted by the Crown or by Royal Charter. I have not the slightest doubt he thought the Act had nothing whatever to do with such charities. However, if he did think so, he turned out to be wrong, because it was ultimately held in the later case of *Attorney-General* v. *National Hospital for the Relief and Cure of the Paralysed and Epileptic* (1) that s. 29 of the Charitable Trusts Amendment Act, 1855, did apply to charities governed by Royal Charter, if that were all.

Now after more than fifty years have elapsed since the Act of 1855 the Crown for the first time, as I understand, sets up the present claim and, notwithstanding the Act of 1885 to which I have adverted, and as to the meaning and intention of which I cannot help thinking that the advisers of the Crown hold an opinion different from that which I entertain, we have this action. But apart altogether from the Act of 1885, it appears to me that the real estate held by this charity—the Bloomsbury estate—is derived from the investment of donations of which no special application or appropriation was directed or declared by the donors and which might legally have been applied as income. With regard to the City property, that was presented to the charity. The case I referred to does not bring it within this section.

Consequently, seeing that this charity has been and is maintained partly by voluntary subscriptions, in my opinion both the Bloomsbury estate and the City property are exempt from s. 29 of the Act of 1855 under the express provisions of s. 62 of the Act of 1853 coupled with s. 48 of the Act of 1855; in other words, I am of opinion that this action fails.

Solicitors: *Treasury Solicitor; T. H. Gardiner.*

(1) [1904] 2 Ch. 252.

R. M.

WARRINGTON J.
1914
May 6.

In re HOWELL.
In re BUCKINGHAM.
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[1914 H. 726.]

Will—Construction—Residue to be at Discretion of Executor and at his own Disposal—Prior Legacy in Will to Executor—Executor, whether entitled beneficially.

Testatrix by her will appointed G. B. her executor, and directed him to pay her debts and funeral and testamentary expenses. She then bequeathed various pecuniary legacies, including a legacy to G. B. "(my executor)," and concluded her will in the following terms:—"After the aforesaid legacies have been duly paid the remainder or residue of my property (if any) shall be at the discretion of my executor and at his own disposal":—

Held, that G. B. took the residuary estate of the testatrix in his capacity of executor and not as a beneficiary and held it as trustee for the next of kin of the testatrix.

Fenton v. *Nevin* (1893) 31 L. R. Ir. 478 followed.

Gibbs v. *Rumsey* (1813) 2 V. & B. 294 discussed and distinguished.

Adjourned Summons.

Jane Howell by her will, dated September 27, 1901, and which was made on a printed form, provided as follows: "I appoint George Buckingham, weaver, of Station Street, West Foleshill, Coventry, and of to be the executor of this my will. I direct my executor to pay my just debts and funeral and testamentary expenses. I give and bequeath unto my brother Joseph Riley of Sheffield all his expenses which he shall incur by attending my funeral."

The testatrix then bequeathed various pecuniary legacies including the following: "Unto Hannah Buckingham wife of my executor the aforesaid George Buckingham the sum of twenty pounds Unto George Buckingham (my executor) the sum of ten pounds." She concluded her will in the following terms: "After the aforesaid legacies have been duly paid the remainder or residue of my property (if any) shall be at the discretion of my executor and at his own disposal."

The testatrix died on May 2, 1903.

George Buckingham died on September 18, 1910, having by

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his will, dated August 27, 1910, appointed F. Liggins and E. Hilton executors thereof, who thereby became derivative executors of the will of the testatrix, and having given his residuary estate to Willliam Buckingham and Hannah Selina Flude.

The residuary property of the testatrix consisted (inter alia) of a reversionary interest, which had recently fallen into possession.

This was an originating summons taken out by the executors for the determination of the questions (inter alia) whether upon the true construction of the will of the testatrix the gift of "the remainder or residue of my property (if any) shall be at the discretion of my executor and at his own disposal" constituted a beneficial gift in favour of George Buckingham, with a power of disposition by will or otherwise, and (2.), if the last-mentioned question should be answered in the negative, who, upon the death of the testatrix, became entitled to her residuary estate.

Horace Freeman, for the summons.

H. M. Broughton, for the defendants William Buckingham and Hannah Selina Flude. It is submitted that George Buckingham took the residue of the testatrix's estate beneficially. There is no trust or suggestion of a trust in the will, and, as decided by the House of Lords in *Williams* v. *Arkle* (1), the question whether a person is to take as executor or trustee only or to have a beneficial interest under the will is a question of intention to be ascertained from the words of the will itself. It is true that in this will the testatrix has stated that the residue "shall be at the discretion of my executor and at his own disposal," but the executor referred to is a particular individual, and the testatrix has shewn that she means George Buckingham, and not any person who may become executor, as in leaving him a legacy she refers to him as "George Buckingham (my executor)" and she uses the word "executor" in the singular. The residue is to be "at his own disposal," and there being no trust in the will he could dispose of it by spending it or leaving it by will. Supposing the words had been "for his

(1) (1875) L. R. 7 H. L. 606.

own benefit" no one could have questioned that it was a gift to George Buckingham, and "at his own disposal" means exactl the same thing.

On the other hand, in cases where property is given on trust and the trusts do not exhaust the whole of the interest and the residue is given as the executor shall determine, there he is regarded as a distributor, and as the purpose is too vague he holds for the next of kin. See for instance *Yeap Cheah Neo* v. *Ong Cheng Neo.* (1) Here there being no trust that class of cases does not apply. The present case is also covered by *Gibbs* v. *Rumsey.* (2)

J. W. Manning, for the next of kin. There is not enough on the will to entitle the executor to retain the property beneficially.

[WARRINGTON J. Where a testator says that his executor may do what he likes with the property, must he give it to the next of kin?]

Gibbs v. *Rumsey* (2) has been adversely criticized in several cases and was said by Wood V.-C. in *Buckle* v. *Bristow* (3) to go to the verge of the law. The words "shall be at the discretion of my executor" in the will indicate, it is submitted, an intention on the part of the testatrix to impose a trust upon the executor to distribute the property among persons other than, or at all events in addition to, himself: *Yeap Cheah Neo* v. *Ong Cheng Neo* (4); *Fowler* v. *Garlike.* (5)

[WARRINGTON J. There is something in Mr. Broughton's contention that there is here only one executor.]

It is submitted that the rule applies to one executor as well as to more executors. It is difficult to draw any distinction between this case and *Fenton* v. *Nevin* (6), where the words were "I will my executors shall apply the overplus, if any, as they think fit." There is no reason why the words in this will should not be construed as giving the executor a general power of appointment. The onus is on the executor to shew that he is in a position to take beneficially and that that is so clear as not to leave any reasonable doubt in the mind of the Court. The words "at

(1) (1875) L. R. 6 P. C. 381.
(2) 2 V. & B. 294.
(3) (1864) 10 Jur. (N.S.) 1095.
(4) L. R. 6 P. C. 390.
(5) (1830) 1 Russ. & My. 232.
(6) 31 L. R. Ir. 478.

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his own disposal" do not confer any beneficial interest on the executor: they are equivalent to "at his sole disposal," as he is the only executor of the will: *In re Sinclair.* (1)

[WARRINGTON J. There were actual trusts in that case.]

Suppose the testatrix in this case had appointed another executor by a codicil, which of them would then have taken?

H. M. Broughton in reply.

[WARRINGTON J. I should like to hear what you say as to *Fenton* v. *Nevin.* (2)]

In that case there were really words of trust, the words "I will" implying a trust. Here the words "at his own disposal" rebut any trust.

[WARRINGTON J. If the testatrix had said "at the disposal of George Buckingham" there would have been more to say in favour of your view. You must in order to succeed go so far as to say that if the testatrix had appointed another executor by codicil George Buckingham would nevertheless have taken.]

Confusion is sometimes introduced into testamentary dispositions by an executor being appointed by codicil, but here it is not so. The testatrix refers to a definite person "George Buckingham."

WARRINGTON J. The question in this case is whether George Buckingham, who was appointed by the testatrix her executor, took the residue of her estate beneficially, or only in his capacity as executor, in which case he would in the result hold it for the next of kin of the testatrix. The will is on a printed form, and is obviously home-made except in so far as the printed form afforded the testatrix a model. She appointed "George Buckingham, weaver, of Station Street, West Foleshill Coventry, and of " (the blanks were not filled up) "to be the executor of this my will." The testatrix continues: "I direct my executor to pay my just debts and funeral and testamentary expenses." There is there an express direction to the executor to do something. Then she continues, "I give and bequeath unto my brother Joseph Riley of Sheffield all his expenses which he shall incur by attending my funeral." Then follow certain

(1) [1903] W. N. 113. (2) 31 L. R. Ir. 478.

legacies of which I need only read two: "Unto Hannah Buckingham, wife of my executor the aforesaid George Buckingham, the sum of twenty pounds Unto George Buckingham (my executor) the sum of ten pounds." The testatrix concludes her will in the following terms: "After the aforesaid legacies have been duly paid the remainder or residue of my property (if any) shall be at the discretion of my executor and at his own disposal."

I think that the real question I have to decide is whether the expression "my executor" in this last clause of the will means George Buckingham irrespective of his capacity as executor or whether it means "my executor," that is the person appointed by her will to be her executor, or the person who should have the duty of administering her will.

In this as in other cases the question which the Court has to decide is what do the testatrix's words mean? There is no rule of law beyond this, that if one arrives at the conclusion that the discretion and power of disposal vested in the executor are given to him in his capacity as executor, then he holds upon trust and the trust is too uncertain to be carried into effect, and so must fail, and there will be a trust for the next of kin of the testator.

Several authorities have been cited, and the one most relied upon on behalf of the executor and the nearest to this case is *Gibbs* v. *Rumsey*. (1) In that case the will, like the one in the present case, was a short one. The testatrix gave to her executors certain chattels to be disposed of to such persons and in such proportions as they or the survivor of them should in their or his discretion think proper. She then devised and bequeathed her freehold, copyhold, and personal estate to Henry and James Rumsey, their heirs, executors, administrators, and assigns, upon trust to sell, and out of the money to arise from such sale and her ready money she bequeathed several legacies, and among them 100*l.* to each of her trustees for their care and trouble, and gave all her books to Henry Rumsey to be retained by him or divided among such of his friends as he should think proper. The testatrix then proceeded: "I give and bequeath all the rest and residue of the monies arising from the sale of my said estates, and all

(1) 2 V. & B. 294.

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the residue of my personal estate after payment of my debts, legacies, and funeral expenses, and the expenses of proving this my will, unto my said trustees and executors (the said Henry Rumsey and James Rumsey)." Pausing there, there is an actual gift in express terms of what remained after those two persons had fulfilled the trusts imposed on them by the earlier part of the will. The will then continues, "to be disposed of unto such person and persons and in such manner and form and in such sum and sums of money as they in their discretion shall think proper and expedient." Sir William Grant M.R. in that case held that that was in effect a gift of the property to the persons named as executors beneficially because they could dispose of it as they thought proper, and therefore could apply it for their own purposes, and consequently it was a gift to them absolutely. That was undoubtedly a strong decision in favour of a gift to the executors beneficially because there was a great deal to shew that there was a trust, as the gift to the executors was in express terms of what remained after they had fulfilled the trusts previously imposed on them.

That decision has been commented upon in several subsequent cases. It was commented upon by Lord Cottenham in *Ellis* v. *Selby*. (1) It was again commented upon and stated to go to the very verge of the law by Wood V.-C. in *Buckle* v. *Bristow*. (2) It was also referred to and questioned in *Fenton* v. *Nevin* (3), to which I am about to refer. So far as I can see there is no case in which it has been followed and in every case in which it has been cited the judge has either observed upon it unfavourably or has distinguished it from the case before him. As far as I know it has never been treated as an authority on which it would be safe to rely.

The last case to which I wish to refer is *Fenton* v. *Nevin* (3), before the Court of Appeal in Ireland. In that case the testator by his will, after bequeathing certain charitable legacies, proceeded as follows: "I appoint Edward Nevin, 48, Aungier Street, and the Rev. J. G. Carleton, of St. Peter's Church, my executors. I will and bequeath unto each of them 50*l*. each. I will 20*l*. to

(1) (1836) 1 My. & Cr. 286. (2) 10 Jur. (N.S.) 1095.
(3) 31 L. R. Ir. 478.

my clerk, Thomas Moore; also I leave 12*l.* to my servant Mrs. Gannon. I wish my houses to be sold by auction, and also my stock in my shop, together with the fixtures. I will my executors shall apply the overplus, if any, as they think fit." Notice in that will as in the will in the present case that there was no gift to the executors at all except by their appointment as executors and by the gift of legacies to them. There was no express gift to them of the bulk of the estate, and they took that merely in their capacity of executors. That is an important consideration. The Vice-Chancellor in the Court below had decided that the executors took the beneficial interest in the residue. The case came before the Court of Appeal consisting of Walker L.C. and FitzGibbon and Barry L.JJ. Walker L.C. in the course of his judgment, after observing that the statute of 11 Geo. 4 & 1 Will. 4, c. 40, did not apply, says (1): "Starting with this, the executors here are charged with a trust to pay the various legacies, retain their own, sell the house property, and, having sold it, they, on the words of the will, 'shall apply the overplus, if any, as they think fit.'" Except that in that case there was an express direction to the executors to sell, the words of the Lord Chancellor apply to the present case, because there there was no gift to them of the residue except that arising from the fact that they were appointed executors, so here the executor, to adopt the language of the Lord Chancellor, is charged with a trust to pay the various legacies, retain his own, "and the remainder or residue of my property (if any) shall be at the discretion of my executor and at his own disposal." The main difference between that case and the present is that there was there a discretion given to the executors to apply the residue "as they think fit," whereas here the discretion is to apply it "at his own disposal." The Lord Chancellor continues: "They are to do everything in the character to which the trusteeship is annexed, and from which, unless there be an express gift to them, personal benefit is excluded." By that he means that the executors are to do all these things in their capacity of executors. The residue is to be in the discretion or disposal of the executors. Accordingly he held that the residue came to them as executors and therefore

(1) 31 L. R. Ir. 481, 484.

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must be treated as held by them in trust for the next of kin. He then proceeds to deal with some of the authorities and in particular with *Gibbs* v. *Rumsey* (1) and says, "If *Gibbs* v. *Rumsey* (1) had not existed, the case would be hardly arguable." He then refers to the criticisms on that case and concludes by saying, "In my opinion, *Gibbs* v. *Rumsey* (1) does not rule this case, even if it be law, and the executors must apply the overplus as trustees." FitzGibbon L.J. says: "It is plain that whatever an executor takes *as such* he takes as a representative, and therefore not beneficially. Accordingly, before an executor can take any part of the assets beneficially, he must show that the testator has given it to him as an individual. Three leading observations occur to me on reading this will. In the first place, I cannot find any gift of property to any one except in the form of a legacy, pecuniary or specific. Next, every legacy is given directly to the legatee in express terms. This observation is enforced by remarking how the executors are referred to. The testator says:—'I appoint Edward Nevin and the Rev. J. G. Carleton my executors. I will and bequeath unto each of them 50*l.* each.' Their appointment is distinct, and is followed by a personal gift of 50*l.* to each of them by way of legacy, bequeathed in the very same terms as the legacies to the hospitals, the testator's clerk and servant, and the other objects of his bounty. The third observation arises on the frame of the residuary clause—'I will my executors shall apply the overplus, if any, as they think fit.' He does not give it to them, he wills that they shall *apply* it as they think fit. In what capacity are they to apply it? In the capacity in which they get it, viz. as executors. It follows that, in applying it, they are to act in their representative and not in their personal capacity." I need not read any more of that judgment.

I now go back to the will in this case, after having been told by FitzGibbon L.J. that if the executor acquires the residue as executor he cannot take it beneficially, to see whether under this will the executor takes it as such. The first observation that occurs to one in reference to this case is the same as that which FitzGibbon L.J. made, namely, that there is no gift to any one

(1) 2 V. & B. 294.

except in the form of a legacy. Every legacy is given directly to the legatees in express terms. The third observation of the Lord Justice does not apply here because the clause is in a different form.

Now in what capacity does this executor take this property which is directed to be at his own disposal? I must say that he takes it in the capacity in which he gets it. He gets it not by virtue of any gift but simply as executor, and he holds it as executor at his own disposal. I must come to the conclusion that the property is to be disposed of by him as executor, and, as FitzGibbon L.J. says, he is to act in his representative and not in his personal capacity. He cannot therefore distribute the property for his own benefit, and the only possible way in which he can hold it is as trustee for the next of kin of the testatrix.

Solicitors: *Collyer-Bristow, Curtis, Booth, Birks & Langley, for F. Hall, Folkestone; Arthur C. Dowding, for W. L. J. Orton, Coventry.*

W. I. C.

Applied. *Re* DAVIES (*decd.*). [1950] 1 All E.R. 120.

SARGANT J.

1913

Oct. 21.

In re TATE.

WILLIAMSON *v.* GILPIN.

[1912 T. 1618.]

Will—Construction—Gift of Income to Children during their Lives or to Issue of any dying before the others—Gift over after Death of all Children to Grandchildren—Implication of Cross-Remainders during Life of Survivor.

Testator specifically devised certain real estate in trust to pay the income arising therefrom amongst his children in equal shares during their lives, or to their issue in case any of them should die before the others of them, and from and after the decease of all his children then in trust to sell the same and to divide the proceeds between his grandchildren in equal shares per stirpes and not per capita; and devised his residuary real and personal estate in trust to sell the same and hold the proceeds in trust for his wife and three children. The testator died in 1910, leaving three children him surviving—(1.) Elijah, his heir-at-law, who was still living; (2.) Emile, who died in 1910, leaving one child; and (3.) Frances, who died in 1911 without issue:—

Held, that on the true construction of the will during the remainder of Elijah's life Elijah and the child of Emile were entitled in equal shares to Frances' one third share of income.

Armstrong v. *Eldridge* (1791) 3 Bro. C. C. 215; *Pearce* v. *Edmeades* (1838) 3 Y. & C. Ex. 246; and *In re Richerson* (No. 2) [1893] 3 Ch. 146 followed and applied.

ADJOURNED SUMMONS.

George Tate by his will, dated May 8, 1907, devised and bequeathed all his real and personal estate unto George Gilpin upon trust to pay his debts and funeral and testamentary expenses, and subject thereto directed him to hold his real estate situate in Roundhay Road in Leeds "upon trust to pay the income arising therefrom unto my children in equal shares during their lives, or to their issue in case any of them shall die before the others of them, and from and after the decease of all my children then in trust to hold the same property in trust to sell the same and to divide the proceeds thereof unto and between my grandchildren in equal shares per stirpes and not per capita"; and as to all other his real and personal estate in trust to sell the same and hold the proceeds of such sale in trust for his wife and his three children in equal shares absolutely; and the testator appointed the said George Gilpin his sole executor.

By a codicil dated May 16, 1910, the testator appointed his son Elijah and his daughter Frances to be additional trustees and executors of his will.

The testator died on June 24, 1910, leaving him surviving three children—(1.) Elijah, his heir-at-law, who was still living and had two infant children; (2.) Emile Williamson, who died in November, 1910, leaving one child, Dorothy Anne Williamson; and (3.) Frances Hewitt, who died in October, 1911, without issue.

This was an originating summons taken out by Dorothy Anne Williamson raising (inter alia) the question whether upon the death of Frances Hewitt, and during the remainder of the life of Elijah Tate, Frances Hewitt's one third share of the income of the real estate situate in Roundhay Road in the city of Leeds (*a*) became payable to the plaintiff Dorothy Anne Williamson, (*b*) became divisible between the plaintiff Dorothy Anne Williamson and Elijah Tate in equal shares, (*c*) became divisible between the four residuary legatees named in the testator's will, or (*d*) was undisposed of by the said will and became payable to Elijah Tate as heir-at-law of the testator.

Wright Taylor, for the plaintiff. Frances' one third share of income is now divisible between the plaintiff and Elijah in equal shares. The gift is a gift of income to the three children or their respective issue, if any die leaving issue, during the life of the longest liver. The testator's obvious intention was to deal with the income as a whole, and on the death of a child without leaving issue something in the nature of cross-remainders must be implied till the death of Elijah, when the trust for sale will take effect: *Armstrong* v. *Eldridge* (1); *Pearce* v. *Edmeades*. (2)

[SARGANT J. referred to *In re Richerson* (No. 2). (3)]

This construction is in accordance with the rule laid down in those cases and the rule is not affected by the substitution of the issue of any child who dies leaving issue for the parent.

Secondly, if I am wrong in that contention, in any case there

(1) 3 Bro. C. C. 215. (2) 3 Y. & C. Ex. 246.
(3) [1893] 3 Ch. 146.

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is no intestacy as to Frances' one third share of income, but it falls into the residuary gift, there being no contrary intention to take the case out of s. 25 of the Wills Act: Theobald on Wills, 7th ed. p. 229; Hawkins on Wills, 2nd ed. p. 58; *Rooke* v. *Rooke* (1); *Morris* v. *Lloyd.* (2)

Frank MacDermot, for Elijah Tate. As sole survivor Elijah Tate takes the whole of Frances' one third share of income. The plaintiff was no doubt entitled by substitution to her mother's original share, but the share which accrued on the death of Frances ought to be dealt with rather on the footing of a gift in joint tenancy to the three children themselves, which will have the effect of giving the whole share to Elijah: Jarman on Wills, 6th ed. p. 642; *Pearce* v. *Edmeades.* (3) Secondly, if I am wrong in this contention, then I support the argument that the share is divisible in equal moieties between the plaintiff and Elijah. I do not suggest an intestacy.

Borthwick, for the residuary legatees. Frances' one third share of income falls into the residue. There is no joint tenancy, nor can any gift over be implied other than such as is contained in the residuary gift. The case of a child dying without leaving issue is not otherwise provided for by the testator.

P. F. S. Stokes, for the trustee.

SARGANT J. This summons raises a question as to the destination of part of the income of certain freehold property during the remainder of the life of the sole surviving child of the testator. By his will the testator directed his trustees to hold the property "upon trust to pay the income arising therefrom unto my children in equal shares during their lives, or to their issue in case any of them shall die before the others of them, and from and after the decease of all my children" then in trust to sell the property and divide the proceeds of sale between his grandchildren in equal shares per stirpes and not per capita, and he gave his residuary real and personal estate in trust for sale and to hold the proceeds of sale in trust for his wife and three children in equal shares. The testator had issue three children

(1) (1703) 2 Vern. 461. (2) (1864) 33 L. J. (Ex.) 202.
(3) 3 Y. & C. Ex. 246.

who survived him—Elijah, who is still living and has issue two infant children; Emile, who died in November, 1910, leaving one child, the present plaintiff; and Frances, who died in 1911 without issue. It is conceded that on the death of Emile her share of income became payable to her child, the present plaintiff. The question is what becomes during the remainder of Elijah's life of the one third share of the other deceased daughter Frances: whether (1.) it is now divisible in equal shares between the plaintiff and Elijah, or (2.) is payable exclusively to Elijah under the terms of the will, or (3.) falls into the residue, or (4.) vests in Elijah as heir-at-law of the testator. I may say at once that it is quite clear on s. 25 of the Wills Act and on authority, of which *Rooke* v. *Rooke* (1) is an example, that there is no intestacy, and indeed this point was not contested before me on the part of the heir-at-law. The real question is whether on the language of the will there is a sufficient indication of an intention on the part of the testator to create what I may call cross-remainders between the three children, including the issue of any deceased child. If the words had been such as they are, only omitting the substitution of the issue of a deceased child for his or her parent, there is, in my opinion, ample authority to shew that cross-remainders for life would have been implied between the children. I need only refer to *Armstrong* v. *Eldridge* (2), *Pearce* v. *Edmeades* (3), and *In re Richerson* (No. 2) (4), where Chitty J.'s decision in chambers was afterwards confirmed by him in Court. That being so, is there any difference in the present case because of the words substituting issue for a deceased parent? In my opinion there is no difference. I think that the testator is intending that the property shall be kept together as a whole until the death of the survivor of his children and that the income shall go amongst the children who survive either by themselves or by their respective issue, the issue being substituted for his or her parent. It is clear that they are so substituted for the parents in respect of original shares, and if so I see no reason why they are not equally so substituted in respect of an accruing share given over by way of cross-remainder. Otherwise

(1) 2 Vern. 461.
(2) 3 Bro. C. C. 215.
(3) 3 Y. & C. Ex. 246.
(4) [1893] 3 Ch. 146.

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there would be an hiatus, which seems to me contrary to the general intention of the testator which he has sufficiently indicated that the children or issue of the children shall together take all the income of the estate, and that on the death of the survivor of the children the whole property shall go amongst their children. The result of the construction for which Mr. McDermot contends would be this, that during the remainder of Elijah's life he would take two thirds and the plaintiff one third of the entire income and that on Elijah's death his children would take one half and the plaintiff the other half of the capital, which seems to me to be a most curious result. According to the construction for which Mr. Borthwick contends Elijah would take one third of the entire income, the plaintiff would take another third, and the remaining third would fall into the residue, which may perhaps be a little less capricious. But in my opinion it is not difficult to imply cross-remainders in the present case, and in doing so I do not think that I am going further than the various judges went in the three cases to which I have referred.

Solicitors: *Corbin, Greener & Cook, for Barber & Co., Harrogate; Bernard Baines, for Wright, Leeds; Iliffe, Henley & Sweet, for L. & W. Thompson, York; Wetherfield & Baines.*

A. C.

In re HYDRAULIC POWER AND SMELTING COMPANY.

ASTBURY J.

1914

May 26.

[0028 of 1914.]

Company—Reduction of Capital—Consent of Creditors—Evidence—Holders of Bearer Debentures — No List — Trust Deed—Majority Clause—Extraordinary Resolution—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 49, 50—*General Order (Reduction of Capital)*, 1909, *r.* 17.

The consent of the holders of bearer debentures to a proposed reduction of a company's capital was evidenced by an extraordinary resolution in that behalf duly passed under a majority clause in the trust deed and binding on all the debenture-holders.

About 87 per cent. in value of the total amount of the debenture debt was represented at the meeting, which was duly convened, and the resolution was passed unanimously.

It was not possible to ascertain the names of all the debenture-holders :—

Held, that in the circumstances the extraordinary resolution was sufficient evidence of the consent of all the debenture-holders within s. 50 of the Companies (Consolidation) Act, 1908, and r. 17 of the General Order (Reduction of Capital), 1909, and that it was not necessary to have a list of the debenture-holders under s. 49.

Petition.

The above company was incorporated on August 4, 1911, with a capital of 1,000,000*l.* divided into 1,000,000 shares of 1*l.* each, all of which were issued and fully paid or credited as fully paid.

In pursuance of an agreement referred to in the memorandum it acquired the entire share capital of a Norwegian hydraulic power company, a Norwegian smelting company, and a Swedish smelting company.

The company's objects included power to distribute among the members in specie any property of the company, or any proceeds of sale or disposal of any property of the company, and for such purpose to distinguish and separate capital from profits, but so that no distribution amounting to a reduction of capital be made except with the sanction (if any) for the time being required by law.

The company issued bearer debentures to the amount of 875,000*l.*, part of an authorized issue of 1,000,000*l.*, carrying 5 per cent. interest and payable on September 30, 1955, or on such earlier date as the principal moneys became payable in

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accordance with the conditions. These were secured by a trust deed of September 4, 1911. This deed specifically charged the shares of the Norwegian and Swedish companies which were to be transferred to the trustees and created a floating charge on the general assets and undertaking, including the uncalled capital.

Clause 32 provided that the provisions contained in the second schedule thereto should have full effect in the same manner as if they were therein set forth.

Clause 33 provided that any notice might be given by the company or by the trustees to the debenture-holders by advertising the same at least once in *The Times* and once in such newspapers abroad as the company might determine, and any notice so given should be deemed to have reached the debenture-holder on the day following that on which it was advertised.

The second schedule contained provisions for the holding of general meetings of the debenture-holders.

Clause 2 provided that seven days' notice at least specifying the place, day, and hour of meeting should be given to the debenture-holders previously to any meeting of the debenture-holders, and such notice should be given in accordance with clause 33 of the trust deed and any such notice should specify the general nature of the business to be transacted at the meeting thereby convened.

Clause 15 provided that a general meeting of the debenture-holders should have (inter alia) the following powers exercisable by extraordinary resolution, namely:—

(1.) Power to sanction the release of any of the mortgaged premises.

(2.) Power to sanction any modification or compromise of the rights of the debenture-holders against the company or against its property, whether such rights should arise under the trust deed or otherwise, and in particular without prejudice to the generality of the foregoing words to sanction any compromise or arrangement proposed to be made between the company and the debenture-holders provided that it was one which the Court would have jurisdiction to sanction under the Companies (Consolidation) Act, 1908, or any statutory modification or re-enactment

thereof for the time being subsisting, if the company were being wound up and the requisite majority at a meeting of the debenture-holders summoned pursuant to that Act or any modification or re-enactment thereof had agreed thereto.

(3.) Power to assent to any modification of the provisions contained in the trust deed or in the debentures which should be proposed by the company and assented to by the trustees.

Clause 16 provided (inter alia) that an extraordinary resolution passed at a general meeting of the debenture-holders duly convened and held in accordance with the trust deed should be binding upon all the debenture-holders whether present or not present at such meeting, and each of the debenture-holders should be bound to give effect thereto accordingly, and the passing of any such resolution should be conclusive evidence that the circumstances justified the passing thereof, the intention being that it should rest with the meeting to determine (without any right of appeal being allowed) whether or not the circumstances justified the passing of such resolution.

Clause 17 provided that the expression " extraordinary resolution " when used in that schedule meant a resolution passed at a meeting of debenture-holders duly convened and held in accordance with the provisions therein contained by a majority consisting of not less than three fourths of the persons voting thereat upon a show of hands, or if a poll was duly demanded then by a majority consisting of not less than three fourths of the votes given on such poll, and that the quorum of any such meeting should be a clear majority in value of the whole of the debenture-holders.

The shares in the Norwegian and Swedish companies were duly vested in the trustees. The company had power under its articles to reduce its capital.

By an agreement made on July 1, 1913, between Janson on behalf of himself and all the other debenture-holders of the one part and the company of the other part, after reciting (inter alia) that further working capital was required in order to develop and enhance the value of the shares in the Norwegian and Swedish companies, and that it was deemed advisable by the company to carry into effect the following scheme, namely :—

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1. A new company, to be called "The Hydraulic Power Company of Scandinavia, Limited," was to be registered under the Companies (Consolidation) Act, 1908, with a memorandum and articles in the terms of a draft already prepared and approved by the directors of the old company and having amongst its objects the acquisition of the shares in the Norwegian Power Company.

2. The capital of the new company was to be 425,000*l.* divided into 850,000 shares of 10*s.* each.

3. The shares of the Norwegian Power Company were to be sold free from incumbrances to the new company for 180,000*l.* cash, 797,500 fully-paid shares of 10*s.* each in the new company, and 437,500*l.* first mortgage debentures of the new company, part of an issue of 700,000*l.* like debentures of the new company, upon the terms of an agreement the draft of which had already been prepared and approved by the directors of the old company.

4. The said 437,500*l.* debentures of the new company were to bear the same rate of interest and be in the same form as the bearer debentures of the old company so far as applicable and to be secured by a specific charge on the Norwegian Power Company's shares and by a floating charge on the other assets of the new company.

5. The old company was to procure subscriptions for 212,500*l.* debentures of the new company at 85 per cent.

6. Provided the approval of the Court was obtained 500,000 fully-paid shares of the new company, part of the 797,500 fully-paid shares of the new company to be allotted to the old company, were to be distributed by the old company amongst its shareholders by way of return of capital to the extent of 10*s.* per share upon the issued capital of 1,000,000 shares of 1*l.* each of the old company, and the capital of the old company was to be reduced from 1,000,000*l.* divided into 1,000,000 shares of 1*l.* each to 500,000*l.* divided into 1,000,000 shares of 10*s.* each. Should the approval of the Court not be obtained, such 500,000 shares of the new company should belong to the old company, and in no case should any of the said 797,500 shares or the said 180,000*l.* cash form part of the specific security under the trust deed of September 4, 1911.

And reciting that before proceeding further with the scheme

it was necessary to obtain the sanction of the debenture-holders of the old company pursuant to the second schedule, it was agreed (clause 1) that the old company should be at liberty to carry out the scheme in manner aforesaid and that the shares of the Norwegian Power Company should be released from the security created by the trust deed accordingly so as to enable the sale to be carried into effect but not for any other purpose, and that the trustees should hand over the share certificates on completion of the sale, and (clause 2) that if within six calendar months the old company should have formed the new company and executed the agreement for sale and if the said 212,500*l.* debentures of the new company should have been subscribed for and paid up, then and in such case the holders of debentures of the old company should accept the issue to them of the said 437,500*l.* debentures of the new company in satisfaction and discharge of all their claims under or in respect of half the nominal value of the debentures of the old company held by them respectively (namely, 437,500*l.* debentures) and should give up such 437,500*l.* debentures of the old company with the coupons to be cancelled, and (clause 3) that the agreement was conditional on the same being sanctioned by an extraordinary resolution of the debenture-holders of the old company duly convened and held in accordance with the second schedule to the trust deed, and that when that condition was fulfilled the agreement should become absolute, and (clause 4) that if the agreement did not become absolute within six calendar months from the date thereof, it should at the expiration of that time become void.

It will be observed that for the purposes of the return of capital the 500,000 shares of the new company were by clause 6 of the scheme treated as worth 500,000*l.*

By extraordinary resolutions duly passed at a meeting of debenture-holders of the old company duly convened and held on July 14, 1913, in accordance with the second schedule to the trust deed it was resolved that the meeting sanctioned and approved the agreement of July 1, 1913, and that the debenture-holders of the old company should produce and surrender to the old company for cancellation one half of the debentures held by them respectively in exchange for debentures in the new company

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as mentioned in the said agreement to the nominal amount of the debentures so surrendered, and that the trust deed and the conditions of the outstanding debentures and of any further debentures which might be issued secured by such trust deed should be modified in manner provided by a supplemental trust deed a draft whereof was approved by the meeting and which the trustees were thereby authorized to enter into and carry into effect.

At this meeting fourteen debenture-holders were present representing in person or by proxy debentures to the amount of 759,410*l.* out of the total 875,000*l.* debentures, i.e., about 87 per cent. The resolutions were carried unanimously.

By an agreement dated July 22, 1913, and made between the old company and the new company (being the agreement referred to in paragraph 3 of the scheme recited in the agreement of July 1, 1913), the old company agreed to sell to the new company the Norwegian Power Company's shares for 180,000*l.* cash, 797,500 fully-paid shares of 10*s.* each in the new company, and 437,500*l.* first mortgage debentures, part of a series of 700,000*l.* first mortgage debentures of the new company to be secured by the new trust deed, and it was agreed that the old company should on or before August 15, 1913, procure 212,500*l.* debentures of the new company at 85 per cent. to be subscribed for and paid up in full.

The sale was duly completed and the subscription for the 212,500*l.* debentures procured and paid. The 437,500*l.* debentures of the new company forming part of the purchase consideration were issued to the debenture-holders of the old company, and the like amount of debentures of the old company were given up and cancelled. The old company had distributed 297,500 of the 797,500 shares of the new company forming part of the purchase consideration among the subscribers for the 212,500*l.* debentures of the new company, leaving 500,000 shares in hand.

The old company having thus disposed of the power branch of its business and intending for the future to confine its operations to the smelting branches, the 500,000 shares of the new company still held by the old company were no longer required for the purposes of the old company.

By special resolution of the old company passed and confirmed in accordance with s. 69 of the Companies (Consolidation) Act, 1908, at extraordinary general meetings of November 4 and November 19, 1913, it was resolved that the capital of the old company be reduced from 1,000,000*l.* to 500,000*l.*, and that such reduction be effected (*a*) by distributing in redemption of capital among the holders of the 1,000,000 shares which had been issued rateably in proportion to the shares held by them 500,000 fully-paid shares of 10*s.* each in the new company, but so that shares which but for this provision would be distributable in fractions should be sold by the old company and the net purchase-money substituted for the fractions, and (*b*) by reducing the nominal amount of each of the shares in the old company's capital from 1*l.* to 10*s.*

On January 22, 1914, the company presented this petition for confirmation of the reduction.

On January 29, 1914, the registrar ordered an inquiry as to the debts, claims, and liabilities of or affecting the old company on March 11, 1914, and ordered notice of the presentation of the petition to be inserted in the *London Gazette* and *The Times* on or before February 10, 1914, and that a list of the persons who were creditors on March 11, 1914, and an office copy of the affidavit verifiying the same be left at chambers on or before March 18, 1914. By some misapprehension it was understood that this inquiry referred to debts now due, and consequently the debentures were not disclosed to the registrar. The notices, however, of the presentation of the petition and of the making of the list of creditors and inviting other creditors to come in were in the usual form extending to all creditors. See General Order (Reduction of Capital), 1909, Forms 2 and 5: Buckley on Companies, 9th ed. pp. 819, 820.

On April 30, 1914, the registrar certified that the only creditors were the company's bankers, who held bills for 66,000*l.*, and that they had consented to the reduction.

On May 19, 1914, the petition came on, and the debentures were mentioned. The Court referred the inquiry back to the registrar to certify as to the debentures and gave leave to amend the petition. The registrar then added a note to his certificate

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stating that the old company had an outstanding debenture debt of 437,500*l*. in bearer debentures, and that at a meeting duly convened and held on July 14, 1913, in accordance with the provisions of the trust deed, of the holders of the then outstanding debentures to the amount of 875,000*l*., extraordinary resolutions (as defined by the trust deed) were passed by the requisite majorities consenting in effect to the proposed reduction. He added "It is reserved for the Court's determination on the hearing of the petition whether such resolutions are a sufficient consent within s. 50 of the Companies (Consolidation) Act, 1908."

Jenkins, K.C., and *J. W. M. Holmes*, for the old company. The extraordinary resolutions bound all the debenture-holders and constituted a sufficient consent within ss. 49 and 50 of the Companies (Consolidation) Act, 1908. Sect. 49, sub-s. 1, entitles every creditor with a provable claim to object to the reduction, but it cannot apply to creditors who are precluded by agreement from objecting. Sub-s. 2 requires a list of creditors entitled to object to be settled "as far as possible." This is no doubt imperative, and the list cannot be dispensed with: *In re Lamson Store Service Co.* (1) But the unknown holders of bearer debentures who do not come in in reply to the advertisement cannot possibly be put on that list.

Notice to the debenture-holders may be given by advertisement: *In re General Bank for the Promotion of Agriculture and Public Works.* (2) In *In re Crédit Foncier of England* (3) Bacon V.-C. held that the unknown holders of bearer debentures who had not come forward in answer to the advertisement for creditors were excluded from the right of objecting. That was a convenient decision, but it is not law. The mere abstention from sending in a claim is not consent: *In re Patent Ventilating Granary Co.* (4)

Sect. 49, sub-s. 3, provides for giving security in the case of non-consenting creditors. We do not propose to give any security as we say that all the debenture-holders have consented within s. 50.

(1) [1895] 2 Ch. 726.
(2) [1869] W. N. 13; 17 W. R. 304.
(3) (1871) L. R. 11 Eq. 356.
(4) (1879) 12 Ch. D. 254.

Sect. 50 enables the Court to confirm the reduction if satisfied that the consent of every creditor entitled to object has been obtained. That clearly includes all creditors entitled to object, whether listed or unlisted. The old General Order of March, 1868, r. 14 (Buckley on Companies, 8th ed. p. 859), required the certificate to shew which of the creditors had consented "in writing" to the proposed reduction. This is no longer necessary under the General Order (Reduction of Capital), 1909: Buckley on Companies, 9th ed. p. 817. Rule 16 merely requires the certificate to shew which of the creditors have consented. In most cases the consent is certified by the registrar. But that is not a sine qua non. Rule 17 provides that "The consent of any creditor . . . . may be evidenced in any manner which the judge shall think reasonably sufficient having regard . . . . to . . . . all the circumstances of the case."

In the present case the consent was delegated to the general meeting, the extraordinary resolutions were passed and acted on, and 50 per cent. of the debentures have been exchanged. In these circumstances the consent of all the debenture-holders is sufficiently evidenced within s. 50 and r. 17.

Astbury J. This is a petition to sanction a reduction of capital. It involves a point that it is important to have cleared up, namely, as to the power of the Court to sanction a reduction where the company has bearer debentures and it has not been possible to settle the list of creditors in the ordinary manner.

The capital of the old company is 1,000,000*l.* in 1*l.* shares. It is proposed to reduce it to 500,000*l.* by returning to the shareholders in specie 500,000*l.* worth of fully-paid shares of the nominal value of 10*s.* each held by the old company in a new Scandinavian company and by reducing the 1*l.* shares in the old company to 10*s.* Prior to the proposed reduction the old company had a debenture debt of 875,000*l.* secured on these 500,000 shares and other assets of the old company. Part of the scheme of reduction consists in obtaining the consent of the debenture-holders not only to the reduction but to an arrangement whereby their debentures in the old company are to be reduced by 50 per cent. to 437,500*l.*

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Under the provisions of the trust deed entered into for securing the debentures it is provided (schedule 2, clause 15) that the debenture-holders shall have power by extraordinary resolution (1.) to sanction the release of any of the mortgaged premises and (2.) to sanction any modification or compromise of the rights of the debenture-holders against the company or against its property, and to sanction any compromise or arrangement proposed to be made between the company and the debenture-holders provided it was one which the Court would have jurisdiction to sanction under the Companies (Consolidation) Act, 1908, and (clause 16) that such an extraordinary resolution when passed should be binding upon all the debenture-holders whether present or not at the meeting, and each of the debenture-holders should be bound to give effect thereto accordingly, and the passing of any such resolution should be conclusive evidence that the circumstances justified the passing thereof, the intention being that it should rest with the meeting to determine whether or not the circumstances justified the passing of the resolution.

In the present case extraordinary resolutions were passed sanctioning the reduction, and also sanctioning an exchange by the debenture-holders of the old company of 50 per cent. of their holding for a similar holding in the new company to be formed as part of the scheme, the details of which it is not necessary to consider. These resolutions were passed unanimously at a meeting of the debenture-holders, at which holders of 759,410*l.* out of the 875,000*l.* debentures were present in person or by proxy.

When the petition went into chambers, by some slip, the debentures were not disclosed, and the registrar's certificate only referred to the unsecured creditors. When the petition came into Court I referred the matter back to the registrar, and the certificate has now been made with the following addendum :— "The above company has an outstanding debenture debt to the amount of 437,500*l.*, such debentures being payable to bearer. At a meeting duly convened and held on July 14, 1913, in accordance with the provisions of the trust deed referred to in paragraph 5A of the petition in this matter of the holders of the then outstanding debentures of the company to the amount of 875,000*l.* extraordinary resolutions (as defined by the said trust

deed) were passed by the requisite majorities consenting in effect to the proposed reduction of capital. It is reserved for the Court's determination on the hearing of the petition whether such resolutions are a sufficient consent within s. 50 of the Companies (Consolidation) Act, 1908."

The question is whether the extraordinary resolutions passed at the meeting of debenture-holders in accordance with the second schedule to the trust deed constitute a sufficient consent within s. 50 of the Companies (Consolidation) Act, 1908.

Sect. 49, sub-s. 1, provides that where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, and in any other case if the Court so directs, "every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction."

Sub-s. 2 provides that "the Court shall settle a list of creditors so entitled to object, and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction."

In this case it is quite impossible to ascertain the names of the debenture-holders. The debentures are bearer debentures. They are widely held, and many are held outside this country.

Sect. 50 provides that "the Court, if satisfied, with respect to every creditor of the company who under this Act is entitled to object to the reduction, that either his consent to the reduction has been obtained or his debt or claim has been discharged or has determined, or has been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit."

It is clear, therefore, that I have no jurisdiction to confirm this reduction unless I am reasonably satisfied that the consent of the debenture-holders has been obtained within the meaning of the Act.

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Under the old General Order of March, 1868, r. 14 (Buckley on Companies, 8th ed. p. 859), the certificate had to shew which of the creditors had consented "in writing" to the proposed reduction. The words "in writing" are omitted in the corresponding rules of the present General Order (Reduction of Capital), 1909: Buckley on Companies, 9th ed. p. 817. Rule 16 provides that the certificate shall shew which of the creditors have consented to the proposed reduction, and r. 17 provides that the consent of any creditor, whether in respect of a debt due or presently due or a debt payable on a contingency or not ascertained or a claim admissible to proof in a winding-up of the company, "may be evidenced in any manner which the judge shall think reasonably sufficient having regard both to the amount of his debt or claim and all the circumstances of the case."

Since the date of the extraordinary resolutions passed by the debenture-holders' meeting the sale of the Norwegian Power Company's shares to the new company has been completed in accordance with the agreement of July 22, 1913, authorized by the agreement of July 1, 1913, which was sanctioned at that meeting, and the new company has further complied with the agreement by issuing 437,500*l.* debentures of the new company to the debenture-holders of the old company, who have agreed to accept and have accepted them and given up a like amount of their debentures in the old company for cancellation. In other words not only were the extraordinary resolutions, which by the terms of the trust deed bound every debenture-holder, duly passed, but the debenture-holders have since the passing of the resolutions further assented to the scheme, by carrying the same into effect, giving up 50 per cent. of the old debentures and taking an equivalent value in the new debentures of the new company.

In these circumstances I think that the consent of all the debenture-holders to the proposed reduction is proved in a manner reasonably sufficient having regard to all the circumstances of the case. I therefore confirm the reduction.

Solicitors: *Ingle, Holmes, Sons & Pott.*

G. R. A.

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[1913 M. 1587.]

Ship—Registered Ship—Sunk in Fairway of Canal—Abandonment—"Constructively lost"—Closing of Registry—Transfer on Sale—Mode of Conveyance—Bill of Sale—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 21, 24, 530—*Merchant Shipping Act*, 1906 (6 *Edw.* 7, *c.* 48), *s.* 52, *sub-s.* 1.

By s. 21 of the Merchant Shipping Act, 1894, as amended by s. 52 of the Merchant Shipping Act, 1906, in the event of a registered ship being either "actually or constructively lost" the owner shall immediately on obtaining knowledge of the event, if no notice thereof has already been given to the registrar, give notice thereof to the registrar, who shall make an entry thereof in the register book, and the registry of the ship in that book shall be considered as closed. The expression "constructively lost" has no meaning as applied to a ship, except in connection with marine insurance, and a vessel which is a constructive total loss within the meaning of the term in marine insurance is "constructively lost" within the meaning of the above section.

On March 22, 1913, a ship of 350 tons gross measurement was sunk in the fairway of the Manchester Ship Canal and abandoned by the owners to the underwriters, who paid as on a total loss. The canal company, acting under s. 530 of the Merchant Shipping Act, 1894, raised the vessel at a cost of 3600*l.* and removed her to a pontoon at Manchester, where on May 1, 1913, they sold her by auction to the defendant for 1675*l.* The contract of sale described the vessel as a "registered ship" of a certain tonnage, and provided that on completion the seller would deliver to the purchaser a delivery order for the vessel. On May 8, the day fixed for completion, the defendant required the canal company to transfer the ship by bill of sale on the ground that she was still a registered ship. On May 22 the canal company offered to execute a bill of sale quantum valeat, but the registry having in the meantime been closed, the defendant declined to complete the purchase. In an action for specific performance of the contract:—

Held, that the ship was "constructively lost" within the meaning of s. 21 of the Act of 1894, and by the operation of that section as amended by the Act of 1906, the ship having ceased to be a registered ship, no bill of sale was necessary to transfer her to the defendant. The canal company had a statutory right to sell the ship whether the registry was closed or not, and as, before action brought, they had offered to execute a bill of sale for what it was worth, the defendant was bound to complete his contract.

Decision of Eve J. [1914] 1 Ch. 453 reversed.

APPEAL from a decision of Eve J. (1)

On March 22, 1913, the *Solway Prince*, a steamer of some

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350 tons gross measurement, was sunk in the fairway of the Manchester Ship Canal, after being in collision with another steamer.

The canal company immediately gave notice to the owners that the sunken steamer was an obstruction and danger to navigation, and that it was their intention forthwith to take possession of, raise, or destroy the vessel, or otherwise to exercise their powers under s. 530 of the Merchant Shipping Act, 1894. (1) The ship was abandoned by the owners to the underwriters, who paid as on a constructive total loss. Pursuant to the above notice, the company, with the assistance of the Liverpool Salvage Association, and at a total expense which exceeded 3600*l.*, raised the vessel, pumped her out, and, having patched her up, removed her to the pontoon at Manchester.

On May 1 the company, having duly complied with the conditions precedent as to advertising the fact, offered the vessel for sale by public auction. She was described in the particulars of sale as "lying on the pontoon at Manchester in a damaged condition." At the auction she was knocked down to the defendant for 1675*l.*; and a contract of sale was thereupon entered into.

The contract described the vessel as "a registered ship" of a certain gross and net tonnage, and contained the clause: "On completion of the purchase the seller will deliver to the purchaser a delivery order for the vessel," the words "legal bill

(1) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 530: "Where any vessel is sunk, stranded, or abandoned in any harbour or tidal water under the control of a harbour or conservancy authority, or in or near any approach thereto, in such manner as in the opinion of the authority to be, or be likely to become, an obstruction or danger to navigation or to lifeboats engaged in lifeboat service in that harbour or water or in any approach thereto, that authority may—

"(*a*) take possession of, and raise, remove, or destroy the whole or any part of the vessel; and . . . .

"(*c*) sell, in such manner as they think fit, any vessel or part so raised or removed, ... and out of the proceeds of the sale reimburse themselves for the expenses incurred by them in relation thereto under this section, and the authority shall hold the surplus, if any, of the proceeds in trust for the persons entitled thereto."

of sale of" (in print like the main part of the document) having been crossed through and the words "delivery order for" substituted in writing for them.

At that time no notice had been given and no steps taken with a view to the closing of the registry of the ship; by the advertisements, shipbuilders, ship repairers, and others were invited to attend the auction, and the vessel was in fact bid for and sold with a view to her being repaired and employed as a ship; her value for breaking up purposes was less than half the amount for which she was knocked down to the defendant. The date fixed for completion was May 8, and at that time the defendant, who had paid a deposit of 167*l.* 10*s.* on signing the contract, attended at Liverpool with the balance of the purchase-money, ready to complete; but a difficulty arose in consequence of his insisting that on payment of the balance he was entitled to have the ship transferred to him by such a bill of sale as would enable him to have his name entered on the register as that of the owner of the ship. He made it clear to the canal company's brokers that what he wanted was a bill of sale executed by the canal company. The canal company's advisers insisted, on the other hand, that he was bound to complete on receiving a delivery order and nothing more; and that it would then be his business to get himself registered, and for that purpose to procure the registry of the ship to be closed, and the ship to be re-registered. The defendant pointed out that this course would involve remeasurement of the ship, and might result in her net tonnage being increased from the then existing 99 tons to a figure over 100 tons, thereby increasing her working expenses, and he refused to complete. An attempt was made to solve the difficulty by the brokers executing a bill of sale in their name, and this was submitted to the registrar with a view to seeing whether it would be accepted as sufficient for the entry on the register of the defendant's name as owner. It turned out it would not; and on May 22 the canal company for the first time offered the defendant a bill of sale executed by themselves, the register in the meantime having been closed at their instigation by a notice from the owner, under s. 21 of the Merchant Shipping Act,

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1894.(1) The defendant refused to accept the bill of sale in these circumstances, or to release the balance of the purchase price which had been deposited in joint names on May 9, under an arrangement whereby the defendant was given possession of the ship for the purpose of executing the necessary repairs to make her again seaworthy.

On June 2 this action for specific performance of the contract was commenced, and by the statement of claim the plaintiffs claimed in substance payment to them of the balance of the purchase-money with interest thereon at 5 per cent. from May 8. To this claim the defendant pleaded that when he bought the ship she was a registered ship, and so described; that it was an implied term of the contract that she should be transferred to him by a bill of sale, and that the vendors would deliver to him her certificate of registry, and would do all things necessary to enable him to be entered on the register as owner of the ship, on production to the registrar of a duly executed bill of sale; and further that, until completion, she should continue as a registered ship.

Eve J. held that it was an implied term of the contract that the ship should be transferred by bill of sale, and that the implied term was not negatived by the express term for a delivery order; that whether or not the ship being a constructive loss on March 22 for insurance purposes was constructively lost within the meaning of s. 21 of the Merchant Shipping Act, 1894, the

(1) The Merchant Shipping Act, 1894, s. 21, sub-s. 1, provides: "In the event of a registered ship being either actually or constructively lost, taken by the enemy, burnt, or broken up, or ceasing by reason of a transfer to persons not qualified to be owners of British ships, or otherwise, to be a British ship, every owner of the ship or any share in the ship shall, immediately on obtaining knowledge of the event, if no notice thereof has already been given to the registrar, give notice thereof to the registrar at her port of registry, and that registrar shall make an entry thereof in the register book."

The Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 52, sub-s. 1, provides: "Sub-section (1.) of section twenty-one of the principal Act"—namely, the Merchant Shipping Act, 1894—"shall be read as if the following words were inserted at the end of that sub-section, 'and the registry of the ship in that book shall be considered as closed except so far as relates to any unsatisfied mortgages or existing certificates of mortgage entered therein.'"

power of sale contained in s. 530 carried with it a power to transfer free from incumbrances; that the company, having been wrong up to May 22, did not put themselves in the right by then offering a bill of sale; and that the action failed. Against this decision the company appealed.

Leslie Scott, K.C., R. B. Lawrence, K.C., and *F. D. MacKinnon*, for the appellants. Eve J. held that it was an implied term of the contract of sale that the ship should be transferred to the purchaser by a bill of sale. It is impossible, having regard to the facts known to the parties, to read into the contract any such implication, those facts being that the transaction was the sale under statutory powers of a damaged ship by persons who were not the owners. It was in fact the sale not of a registered ship but of a wreck which could be completely and properly transferred by a delivery order. The ship was "constructively lost" within the meaning of s. 21 of the Merchant Shipping Act, 1894, as amended by s. 52 of the Merchant Shipping Act, 1906, on March 22, 1913, and by virtue of those sections the registry of the ship must be considered as having been closed, although it was actually on the register at the date of the contract. Eve J. took the view that the ship was not actually or constructively lost within the meaning of s. 21 and that that section therefore had no application to the vessel. It is submitted that he was wrong in taking that view. She was undoubtedly "constructively lost" for insurance purposes, for the owners had abandoned her to the underwriters who had paid as on a constructive total loss. The same considerations apply to the question whether she was "constructively lost" within s. 21. There was no obligation upon the appellants in this case to give a bill of sale, and the respondent was bound to complete upon the execution of a delivery order which would effectively pass to him the property forming the subject of the contract for sale.

C. Robertson Dunlop (*Clayton, K.C.*, with him), for the respondent. After the ship was raised and taken to the pontoon she ceased to be a constructive total loss and was in fact a ship which, though damaged, was capable of being repaired at a comparatively trifling cost. She was at no time "constructively

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lost" except from a marine insurance point of view, and that has no bearing upon the question whether she was "actually or constructively lost" within s. 21.

A delivery order was no doubt necessary in order to give the purchaser possession and the right to go on board, but in order to transfer the property in the ship the appellants were bound to give a bill of sale. There is nothing in the Merchant Shipping Acts to support the view that the canal company, in exercising their statutory power of sale, had no power to give a bill of sale. They did in fact give one on May 22 and it might have been executed on May 8. Sect. 24 of the Act of 1894 enacts that a registered ship or a share therein shall be transferred by bill of sale to be executed by "the transferor," not necessarily the registered owner. The object of s. 21 is to purge the register from obsolete ships, and when a ship has been temporarily lost and is subsequently recovered and is being repaired s. 21 ceases to apply to her. But whether that section applies or not, it does not deprive the defendant of his right to have the ship transferred to him by bill of sale. If the defendant had got his bill of sale on May 8 the ship would never have been taken off the register. The sole question is whether the plaintiffs were entitled to insist upon the defendant paying the balance of his purchase-money on May 8 in the absence of a bill of sale.

"Actually lost" in s. 21 means where the ship is wholly destroyed. "Constructively lost" means where the position is such that total loss is inevitable.

Lord Watson in *Sailing Ship "Blairmore" Co.* v. *Macredie* (1), in discussing whether the ship there was an actual total loss, said: "She did not become, in the strict sense of the term, a total wreck, seeing that she was not reduced to the condition of a mere congeries of wooden planks or of pieces of iron . . . . The test, as I understand it, is simply this: that in order to instruct a total constructive loss, at the date to which the inquiry relates, it must be shewn that a shipowner of ordinary prudence and uninsured would not have gone to the expense of raising and repairing the vessel."

In the Oxford English Dictionary two alternative meanings

(1) [1898] A. C. 593, 603.

of the word "constructively" are given: (1.) constructionally and (2.) inferentially. Suppose the owners had, on March 22, sold the vessel as "a ship," would she have been in accordance with that description in the contract? It is submitted that she would: *Barr* v. *Gibson*. (1)

Different considerations arise with reference to the question of "constructive total loss" in marine insurance. It would be a far-reaching decision to hold that where for the purposes of marine insurance a ship has been taken to be a constructive total loss she ceases ipso facto to be a registered ship. She continues to be a registered ship for the purposes of s. 24 so long as she is in fact on the register. Where a registered ship is transferred to a person who cannot lawfully own a British ship she does not thereby cease to be a registered ship, but is only liable to be forfeited: Merchant Shipping Act, 1906, s. 51. Similarly a constructive total loss does not take the ship off the register. If the ship was constructively lost on March 22 the plaintiffs knew all the facts, and if she ought to be taken off the register it should have been done before the sale. Assuming that s. 21 of the Act of 1894 applies, what the plaintiffs advertised and sold was a ship of ninety-nine tons register lying on the pontoon. She was sold as a registered ship and that was what the defendant contracted to purchase. The only proper mode of conveyance was by bill of sale.

[SWINFEN EADY L.J. If the registry had been closed on May 7, what would have been the proper mode of conveyance?]

Only by bill of sale. But here the ship was on the register and a bill of sale was essential to a transfer of the vessel. The plaintiffs' action was entirely misconceived.

Cur. adv. vult.

April 27. COZENS-HARDY M.R. I agree with the judgment about to be delivered by Swinfen Eady L.J.

SWINFEN EADY L.J. On May 1, 1913, the plaintiffs sold by auction to the defendant under their statutory powers, for the sum of 1675*l.*, a vessel named the *Solway Prince*, which shortly before had sunk in the fairway of the Ship Canal, after being

(1) (1838) 3 M. & W. 390.

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in collision with another vessel, and being an obstruction to the navigation had been raised by the canal company at an expense of about 3600*l.*, being a sum considerably in excess of the value of the vessel. The vessel was described in the particulars of sale as lying on the pontoon at Manchester in a damaged condition, and it was a condition of the sale that the vessel was not to be removed from its then position until she had been made tight and safe for removal to the satisfaction of the surveyor of the Manchester Ship Canal Company.

The plaintiffs brought this action for specific performance of the contract, which was dismissed at the trial on the ground that the defendant was entitled to a transfer by bill of sale, which the plaintiffs had refused to give. The plaintiffs considered that the vessel was "constructively lost" within the meaning of s. 21, sub-s. 1, of the Merchant Shipping Act, 1894 as amended by the Merchant Shipping Act, 1906, s. 52, sub-s. 1, and that the register was or ought to have been closed, and that any bill of sale executed by them would have been simply nugatory, and on that ground they declined to execute a bill of sale. They did offer before action brought to execute a bill of sale quantum valeat, but the register had then been actually closed, and under those circumstances the defendant refused to accept the bill of sale.

The plaintiffs now appeal.

Upon the facts, as to which there is no dispute, I am of opinion that the vessel was "constructively lost" within the meaning of s. 21 of the Merchant Shipping Act, 1894. Where a ship is damaged by a peril insured against, if the cost of repairing the damage, including the cost of raising, would exceed the value of the ship when repaired, she is constructively lost within the meaning of s. 21. It is clear that in the present case the cost of raising and repairing would greatly exceed the value of the ship when repaired. The assured gave to the insurers notice of abandonment, and treated the loss as if it were an actual total loss.

It was the duty of the owner of the ship to give notice to the registrar of the ship having been constructively lost, if no notice of the event had previously been given to the registrar, and the

registry of the ship is to be considered as closed. The master ought also to have delivered up the ship's certificate of registry. The register was actually closed previously to May 22, when the facts came to the knowledge of the registrar.

The purchaser was not entitled to refuse to complete, because the plaintiffs would not execute a bill of sale. The ship had ceased to be a registered ship. The registry was to be considered as closed.

It was urged by the respondent that although this might have been the position if the vessel had been sold on March 22, when she had been abandoned and was lying at the bottom of the Ship Canal, the position had become altered by May 1, when she had been raised and was lying on the pontoon. The answer is that this alteration does not make any legal difference. When a ship has ceased to be registered as a British ship, by reason of having been abandoned, she does not again become a registered ship until she has been re-registered, and by s. 54 of the Act this cannot be done until she has been resurveyed and a fresh certificate of seaworthiness obtained.

It was further urged that the ship was sold as "a registered ship." This was not so. There was no representation that the ship remained a registered ship at the date of sale. The particulars given in the contract are merely descriptive of the ship—length, breadth, depth, gross and net tonnage, when registered. Moreover, the purchase has in fact now been completed, and no complaint is made of any error of description, or indeed could be made, as the purchaser bought with full knowledge of all the facts, and the contract contains a provision that no allowance is to be made for any error of description.

By s. 530, the plaintiffs had full authority to sell the vessel and give a good title to the purchaser. No bill of sale was necessary or could have been effective. The register was closed, and by the contract and delivery order the purchaser obtained the property in and possession of the vessel.

The learned judge below decided that for insurance purposes the ship was undoubtedly "constructively lost" on March 22 (see Marine Insurance Act, 1906, s. 60), but that it did not follow that the same rules as are applied for insurance

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purposes were necessarily to be applied in determining whether a ship is "constructively lost" under s. 21. In my opinion the judgment is erroneous on this point. The expression "constructively lost" has no meaning as applied to a ship, except in connection with marine insurance, and a vessel which is a constructive total loss within the meaning of the term in marine insurance is "constructively lost" within the meaning of s. 21 of the Merchant Shipping Act, 1894.

The defendant further contended that even if the register were closed, such closure made no difference to his right to have a bill of sale as evidence of title, even though it could not have been registered, but the answer to this argument—even if it were well founded—is that before action brought he was offered a bill of sale, for what it was worth, but refused it and declined then to complete the purchase. The closing of the register could not affect the right of the plaintiffs to dispose of the vessel under s. 530. They had an absolute statutory right to dispose of her, whether the register was closed or not, and as before action brought they were willing to give a bill of sale for what it was worth, the defendant was in any case bound to complete his contract.

In my opinion, the appeal should be allowed and judgment entered for the plaintiffs for specific performance, with costs here and below, and the counter-claim should be dismissed with costs.

PICKFORD L.J. I am of the same opinion. I do not propose to go through all the facts of the case—they have been clearly stated by Swinfen Eady L.J.—but I do wish to say a word with regard to the question of whether this ship was constructively lost. I find myself quite unable to attach a different meaning to the words "constructively lost" from that which applies to the words "constructively totally lost" in insurance matters. There is, as far as I know, no other way in which that collocation of words arises than in regard to marine insurance. I cannot understand the distinction attempted to be drawn between a ship being "constructively lost" and "constructively totally lost"; it seems to me that if she is "constructively lost" she must be

"constructively totally lost" and vice versa. It may perhaps appear odd that a ship which is lying in safety on a pontoon is to be considered a constructive total loss, but there is no question that she was a constructive total loss to her owners at that time, and the apparent inconsistency, I think, probably arises from this, that the words "constructively lost" may have been used at a time when the test of constructive total loss had not so clearly been reduced to a question of mercantile profit or loss as it has been at this present time. At present the question of whether a ship is lost, when you are considering constructive total loss, has almost arrived at this, whether commercially it is profitable to repair her, and that being adopted now as the test of constructive total loss, it may make the circumstances of the ship at the time appear inconsistent with the expression "constructively lost." But I find it impossible to give any other meaning which will apply to "constructively lost" as opposed to actual loss in this section, and I am rather confirmed in that view by the fact that although more than one member of the Court put the question to Mr. Dunlop, What is the meaning of it if it means something different from the meaning in marine insurance?—and nobody who has ability and experience in these matters is more able than Mr. Dunlop to give an answer to that question—he was, I think, quite unable to give an answer. That confirms me in the impression I have formed that there is no answer to it, and that the two expressions must mean the same thing. The only doubt I have had is this: whether, the ship being actually on the register, the register not being in fact closed by the registrar, at the date fixed for completion a bill of sale ought to have been given for her as a ship in fact registered. On the whole I do not think that is correct. The specific obligation in the contract was to give a delivery order as against cash upon the day of completion, but, of course, in addition to that there was an obligation on the seller to do what was necessary to complete the title of his purchaser. At the time of completion the sellers had notice from the registrar that he wished to know all the matters with regard to this sale, and that he wished to know them for the purpose of seeing whether the register should be closed or not, and the sellers being a person or a body of the

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experience of the Manchester Ship Canal Company knew also quite well that when those facts came to the knowledge of the registrar the register would be closed, and that therefore to give a bill of sale at that time was entirely inoperative. I cannot find that the Ship Canal Company, although they did not give the bill of sale at that time for those reasons, did anything, or rather failed to do anything, afterwards which was necessary for the completion of the purchaser's title. They supplied the proper information, as they were bound to do, I will not say by statute, to the registrar, and they co-operated, as far as they could, in obtaining the re-registering of the vessel and the purchaser as registered owner, and, as has been pointed out, they did in fact afterwards say they would give a bill of sale for what it was worth. It does not seem to me that they have failed in any obligation which was cast upon them of doing what was necessary for the purpose of completing the purchaser's title. I agree, therefore, that this appeal should be allowed and that judgment should be entered for the plaintiffs.

Appeal allowed.

Solicitors for appellants: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for respondent: *Thomas Cooper & Co.*

G. A. S.

LORD ASHBURTON *v.* NOCTON.

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1914

May 26.

[1913 A. 705.]

Judgment Creditor—Land in Mortgage—Writ of Elegit—Order appointing Receiver—Charge, when operative—Payment of Rent in Advance by Tenant —Right of Judgment Creditor—Judgments Act, 1838 (1 & 2 *Vict. c.* 110), *s.* 13—*Judgments Act*, 1864 (27 & 28 *Vict. c.* 112), *s.* 1—*Land Charges Registration and Searches Act*, 1888 (51 & 52 *Vict. c.* 51), *s.* 5—*Land Charges Act*, 1900 (63 & 64 *Vict. c.* 26), *s.* 2.

Where land is subject to a mortgage and incapable of being delivered in execution under a writ of elegit the registration of a writ of elegit does not operate as a charge on the land under the Land Charges Act, 1900, s. 2. Sect. 2 of that Act must have effect given to it in view of the provisions of s. 5 of the Land Charges Registration and Searches Act, 1888, and the true meaning of the two sections read together is that, in place of the actual delivery in execution, whether legal or equitable, which was required by s. 1 of the Judgments Act, 1864, as a condition precedent to the charge created by s. 13 of the Judgments Act, 1838, becoming effective, there is now substituted the registration of a writ or order capable of affecting the land.

A judgment creditor issued and duly registered writs of elegit against the judgment debtor and subsequently obtained and duly registered an order appointing a receiver of the rents and profits of the judgment debtor's land which was subject to a mortgage and incapable of being delivered in execution under a writ of elegit. After the registration of the writs of elegit but before the appointment of the receiver the tenant of the land, having no notice of the judgment creditor's claim, paid rent in advance to the judgment debtor:—

Held, that the payment was a good payment of rent as between the tenant and the judgment creditor.

Green v. *Rheinberg* (1911) 104 L. T. 149 followed.

De Nicholls v. *Saunders* (1870) L. R. 5 C. P. 589 distinguished.

Adjourned Summons.

This was an application on the part of the plaintiff that Alexander Keith might be ordered to pay to the receiver appointed in the action the sum of 157*l.* 10*s.* due for arrears of rent of Langham Lodge Farm in the county of Essex.

By four orders dated respectively October 31, 1912, November 30, 1912, January 15, 1913, and April 25, 1913, and made in an action of *Lord Ashburton* v. *Douglas and Others* [1911 A. 414],

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the defendant Nocton was ordered to pay to the plaintiff certain sums exceeding 21,000*l.*

On May 5 and 9, 1913, the plaintiff issued four writs of elegit in the county of Essex and elsewhere, which were registered on May 6 and 9, under the Land Charges Registration and Searches Act, 1888. The whole of the defendant's lands, including Langham Lodge Farm, were subject to legal mortgages and incapable of being delivered in execution under a writ of elegit; and on May 27, 1913, the plaintiff brought this action by originating summons against the defendant for a declaration of charge and the appointment of a receiver.

On May 30 an interim receiver was appointed of the rents and profits of the defendant's lands in the county of Essex, including Langham Lodge Farm, and elsewhere, without prejudice to the rights of prior incumbrancers, and the tenants of the said lands were thereby ordered to attorn and pay their rents in arrear and growing rents to the receiver. By an order dated June 6, 1913, the interim receiver was continued; and these two orders were shortly afterwards registered under the Land Charges and Searches Registration Act, 1888.

On May 28, 1913, Alexander Keith, who was the tenant of Langham Lodge Farm, at the request of the defendant paid to him in advance the sum of 157*l.* 10*s.* on account of the half-yearly rent falling due on September 29, 1913. At that date he had no notice of the plaintiff's claim, the first notice he received being notice of the appointment of the receiver given to him on June 4.

The plaintiff alleged that the payment of the 157*l.* 10*s.* to the defendant was not a valid payment of rent as between the plaintiff and Alexander Keith.

Romer, K.C., and *A. a'Beckett Terrell*, for the plaintiff. A payment of rent by a tenant to the mortgagor in advance of the proper date of payment is not a good payment as between the tenant and the mortgagee: *De Nicholls* v. *Saunders* (1); *Cook* v. *Guerra*. (2) There is no difference in this respect between the case of a legal and that of an equitable mortgagee, and s. 13 of

(1) L. R. 5 C. P. 589. (2) (1872) L. R. 7 C. P. 132.

the Judgments Act, 1838 (1), places a judgment creditor in as good a position as a person having an equitable charge provided that the requirements of the subsequent legislation have been complied with. Under the Judgments Act, 1864, s. 1, the charge created by the Judgments Act, 1838, was postponed till the land was actually delivered in execution "by virtue of a writ of elegit or other lawful authority," and it was decided under the Act of 1864 that the delivery in execution in the case of an equity of redemption was by the appointment of a receiver: *Hatton* v. *Haywood* (2); *Anglo-Italian Bank* v. *Davies* (3), in each

(1) The Judgments Act, 1838, s. 13, provides that a judgment against any person shall operate as a charge upon all lands "of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy . . . . and every judgment creditor shall have such and the same remedies in a Court of Equity against the hereditaments so charged by virtue of this Act or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had by writing under his hand agreed to charge the same with the amount of such judgment debt and interest thereon: provided that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment . . . ."

Judgments Act, 1864, s. 1: "No judgment, statute, or recognizance to be entered up after the passing of this Act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority, in pursuance of such judgment, statute, or recognizance."

Land Charges Registration and Searches Act, 1888, s. 5: (1.) "There shall be established and kept at the office of Land Registry a register of writs and orders affecting land, and there may be registered therein, in the prescribed manner, any writ or order affecting land issued or made by any Court for the purpose of enforcing a judgment, statute, or recognizance, and any order appointing a receiver or sequestrator of land."

Land Charges Act, 1900, s. 2: "A judgment or recognizance, whether obtained or entered into on behalf of the Crown or otherwise, and whether obtained or entered into before or after the commencement of this Act, shall not operate as a charge on land, or on any interest in land, or on the unpaid purchase money for any land, unless or until a writ or order for the purpose of enforcing it is registered under section 5 of the Land Charges Registration and Searches Act, 1888."

Sect. 5 repeals (inter alia) s. 1 of the Judgments Act, 1864.

(2) (1874) L. R. 9 Ch. 229.

(3) (1878) 9 Ch. D. 275.

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of which cases a writ of elegit had been previously sued out in accordance with the old practice. In *Ex parte Evans* (1) it was for the first time decided that since the Judicature Acts it was not necessary for the judgment creditor in order to obtain the appointment of a receiver to previously sue out a writ of elegit. Sect. 1 of the Judgments Act, 1864, however, has been repealed, and the rights of the judgment creditor are now regulated by the Land Charges Act, 1900, under s. 2 of which the charge arises in his favour on the mere registration pursuant to s. 5 of the Land Charges Registration and Searches Act, 1888, of a "writ or order for the purpose of enforcing" a judgment. A writ of elegit answers that description, even though it is ineffective as regards an equity of redemption. The intention of the Legislature in these statutes was to protect purchasers, and this protection in the case of an equity of redemption is secured by the registration of the ineffective writ of elegit just as much as by the registration of the effective order appointing a receiver.

The provision in s. 13 of the Judgments Act, 1838, that the charge is not to be enforced till after the expiration of one year from the time of entering up such judgment does not affect the plaintiff's claim on this summons. Notwithstanding that provision the charge created by s. 13 is an existing and continuing charge which the Court will protect: *Yescombe* v. *Landor* (2); *Partridge* v. *Foster* (3); *Smith* v. *Hurst* (4); *Watts* v. *Jefferyes*. (5)

The result is that the plaintiff having a charge on the land by virtue of the registration of the writs of elegit on May 6 and 9, 1913, is entitled to treat this payment of rent in advance by the tenant on May 28, 1913, whether at the time he had or had not notice of the plaintiff's claim, as not being a good payment as against the plaintiff.

Martelli, K.C., and *J. E. Harman*, for the respondent Alexander Keith. The plaintiff only became entitled to a charge on the defendant's land, at the earliest, upon the registration of the order of May 30 appointing the interim receiver. The "writ or order for the purpose of enforcing" a judgment

(1) (1879) 13 Ch. D. 252.
(2) (1859) 28 Beav. 80.
(3) (1864) 34 Beav. 1.
(4) (1845) 1 Coll. C. C. 705.
(5) (1851) 3 Mac. & G. 422.

referred to in the Land Charges Act, 1900, s. 2, means an effective writ or order, that is, one capable of "affecting land," such as is referred to in the Land Charges Registration and Searches Act, 1888, s. 5, and a writ of elegit is wholly ineffective as regards an equity of redemption which can only be affected by an order appointing a receiver: *Hatton* v. *Haywood.* (1) That being so, and the payment by Mr. Keith having been made before the registration of the order appointing the receiver, and in fact before any such order was made, *Green* v. *Rheinberg* (2) is a direct authority in the Court of Appeal to shew that the payment was a good payment against the plaintiff, even putting his rights as a chargee under s. 13 of the Judgments Act, 1838, as high as if he had been a legal mortgagee. A judgment creditor, however, is not in the position of a legal mortgagee; he stands in no better position than a person entitled to an equitable charge who is not entitled to receive the rents and profits, his only remedy being to apply to the Court for the appointment of a receiver: *Seymour* v. *Lucas* (3); *Vacuum Oil Co.* v. *Ellis.* (4) [They also cited *Wills* v. *Luff.* (5)]

Romer, K.C., in reply.

[Carson's Real Property Statutes, 2nd ed. p. 495, was also referred to.]

SARGANT J. This is a curious case arising on the construction of many statutes, but it has been very carefully and well argued before me, and there would be no advantage, I think, in my postponing judgment. [His Lordship stated the facts and said that it was admitted that the arrangement under which the payment was made by Mr. Keith to the defendant was perfectly bona fide, and continued:] The question is whether that payment by Mr. Keith to the defendant is a good payment not only as between Mr. Keith and the defendant but also as between Mr. Keith and the plaintiff.

Under the Judgments Act, 1838, it is provided by s. 13 that judgments shall operate as charges upon the land of the

(1) L. R. 9 Ch. 229.
(2) 104 L. T. 149.
(3) (1860) 1 Dr. & Sm. 177, 180.
(4) [1914] 1 K. B. 693.
(5) (1888) 38 Ch. D. 197.

SARGANT J. debtor. That is putting it very broadly, but certain provisoes are added to that section with regard to the time when the charge is to take effect. Then in the year 1864 the Judgments Act, 1864, provided: "No judgment, statute, or recognizance to be entered up after the passing of this Act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority, in pursuance of such judgment, statute, or recognizance"; the result being that the charge created by the earlier statute was postponed and did not take effect until the actual delivery of the land in execution. It was decided in *Hatton* v. *Haywood* (1) that in order that an equitable interest in land should be affected under the later statute it was not sufficient that the judgment creditor had sued out a writ of elegit; and in *Anglo-Italian Bank* v. *Davies* (2) it was recognized that a judgment creditor, who had sued out a writ of elegit which was useless to him owing to the fact that the debtor had only an equity of redemption in his land, was entitled to the appointment of a receiver by way of equitable execution. In a subsequent case of *Ex parte Evans* (3) it was decided by the Court of Appeal that in order to obtain the appointment of a receiver it was not necessary for the judgment creditor to actually go through the process of first issuing a writ of elegit. From that time forward it has been well recognized that in the case of an equity of redemption the proper mode of obtaining execution is by the appointment of a receiver. Pausing there for a moment, it is quite clear that in the present case, if the old law under the Judgments Act, 1864, had been applicable, there would have been no charge on this land until the appointment of the receiver on May 30, 1913, and that therefore the payment made by Mr. Keith to the defendant would have taken place before the plaintiff had acquired any charge on the land.

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It is, however, the subsequent legislation under the Land Charges Act, 1900, coupled with the Land Charges Registration and Searches Act, 1888, which I have to consider. By s. 2 of the Land Charges Act, 1900, it is provided, "A judgment or

(1) L. R. 9 Ch. 229. (2) 9 Ch. D. 275.
(3) 13 Ch. D. 252.

recognizance . . . . shall not operate as a charge on land, or on any interest in land, or on the unpaid purchase money for any land, unless or until a writ or order for the purpose of enforcing it is registered under section 5 of the Land Charges Registration and Searches Act, 1888." Turning to s. 5 of the Act of 1888 I find this provision in sub-s. 1: "There shall be established and kept at the office of Land Registry a register of writs and orders affecting land, and there may be registered therein, in the prescribed manner, any writ or order affecting land issued or made by any Court for the purpose of enforcing a judgment, statute, or recognizance, and any order appointing a receiver or sequestrator of land."

It is curious that under s. 2 of the Act of 1900 the writ or order mentioned is a writ or order "for the purpose of enforcing" a judgment, while under s. 5 of the Act of 1888 the writ or order mentioned is "any writ or order affecting land." In the present case there is no doubt that the writs of elegit were issued for the purpose of affecting all the lands of the defendant in Essex, including the land in question, and for the purpose of enforcing a judgment. On the other hand it seems to me that, having regard to the decisions to which I have referred, those writs did not actually affect that part of the defendant's land which was subject to mortgages, and were in fact useless for that purpose; and in my opinion s. 2 of the Land Charges Act, 1900, must have effect given to it in view of the provisions of s. 5 of the Land Charges Registration and Searches Act, 1888, and the true meaning of these sections when read together is that, in place of the actual delivery in execution, whether legal or equitable, which was required by the Judgments Act, 1864, as a condition precedent to the charge created by the Judgments Act, 1838 becoming effective, there is now substituted the registration of a writ or order capable of affecting the land. It is not sufficient that the writ or order was issued for the purpose of enforcing a judgment unless that writ or order is one capable of affecting the land. I quite agree with the view that in the case of a legal interest in land a writ of elegit by virtue of s. 2 of the Land Charges Act, 1900, operates as a charge as from the date of registration instead of as from the time of actual delivery in

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execution, but I cannot think that there are also brought within its operation interests in land which could not formerly have been and cannot now be delivered in execution under a writ of elegit.

In my opinion, therefore, I must take it that on May 28, 1913, the date when this payment was made, there was no charge on the land in question in favour of the plaintiff. That being so, it appears to me that the payment made by Mr. Keith was necessarily a good payment as against the plaintiff as well as against the defendant. As I have already said, it is not suggested that Mr. Keith knew of the actual state of affairs. The arrangement between him and the defendant was made with perfect bona fides on his part, and the recent case of *Green* v. *Rheinberg* (1) shews quite plainly that even in the case of a legal mortgage of land, which is a much stronger case than the case of a charge on land given by s. 13 of the Judgments Act, 1838, the mortgagee is bound by an arrangement which has already been made between the mortgagor and the tenant under which a lump sum has been paid to the mortgagor by the tenant for future rent. The case of *Green* v. *Rheinberg* (1), as I read it, is not inconsistent with the earlier case of *De Nicholls* v. *Saunders* (2), because in the earlier case the arrangement between the landlord and the tenant was made subsequently and not previously to the mortgage. I need not pursue the subject further, because when I have once come to the conclusion that the charge in favour of the plaintiff was not a charge on the rent until after the date of the payment by Mr. Keith, it seems to me that I am bound to hold that this payment of rent is a good payment as against the plaintiff, and accordingly I so decide.

Solicitors: *H. S. Knight Gregson; MacLeod, Eyre, Dowling & Co., for Hayward & Son, Stowmarket.*

(1) 104 L. T. 149. (2) L. R. 5 C. P. 589.

A. C.

GRESHAM LIFE ASSURANCE SOCIETY *v.* CROWTHER.

ASTBURY J.

1914

May 13, 14, 15, 19.

[1913 G. 623.]

Registry Acts—Yorkshire—Land settled in Trust for Sale—Mortgage of Proceeds of Sale—Registrability—Yorkshire Registries Act, 1884 (47 & 48 *Vict. c.* 54), *ss.* 4, 14—*Erroneous Representation by Mortgagor to Mortgagees as to Land included in Settlement—Subsequent Acquisition of Land by Mortgagor — Subsequent Mortgagee with Notice — Registered Mortgage—Equitable Estoppel.*

A mortgage of an interest in the proceeds of sale of land in Yorkshire held in trust for sale is not registrable under the Yorkshire Registries Act, 1884, and consequently the priorities of successive mortgages are determined by the dates of notices to the trustees.

Principle of *Arden* v. *Arden* (1885) 29 Ch. D. 702 applied.

By erroneously representing that a registered settlement by way of trust for sale of land in Yorkshire included a certain freehold house a beneficiary obtained a loan from the plaintiffs on mortgage of her interest under the settlement.

The plaintiffs gave notice to the trustees, but did not register their mortgage.

The beneficiary having subsequently acquired the house as heir-at-law to the deceased owner, mortgaged it to F. and B., who had full notice of the plaintiffs' claim thereon and of the representations on which they had relied, but considered that their claim was not well founded.

This mortgage was duly registered :—

Held, that the beneficiary and F. and B., her assigns with notice, were as against the plaintiffs bound by equitable estoppel to treat the house as included in the settlement and subject to the trust for sale thereunder, so that although the plaintiffs' mortgage was not registrable in respect of the house, no priority was acquired by the registration of the subsequent mortgage.

Bloomenthal v. *Ford* [1897] A. C. 156; *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1873) L. R. 6 H. L. 352; and *In re Bridgwater's Settlement* [1910] 2 Ch. 342 applied.

WITNESS ACTION.

On April 23, 1885, John Baxandall, of Plevna Terrace, Bingley, Yorkshire, died intestate leaving his widow Martha Baxandall and his only child, the defendant Emily Crowther, wife of Tom Crowther, of 122, City Road, Bradford, him surviving.

By a settlement made September 9, 1885, between the widow

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of the first part, the defendant Emily Crowther of the second part, and Tom Crowther and Samuel Lund, hereinafter called the trustees, of the third part, reciting that John Baxandall died intestate seised of and entitled to freehold hereditaments situate at Plevna Terrace and certain personal estate, and that the widow was entitled to dower out of the said hereditaments and that the widow and the defendant Emily Crowther were desirous of settling the said hereditaments and personal estate, it was witnessed that the widow and the defendant Emily Crowther conveyed and assigned all the freehold hereditaments and real estate and all the personal estate and effects whatsoever and wheresoever, whether thereinbefore specified or referred to or not, to which the said John Baxandall was at the time of his death seised or entitled as to the real estate unto and to the use of the trustees, their heirs and assigns, free from the widow's dower, and as to the personal estate unto the trustees, their executors, administrators and assigns, upon trust that the trustees should (and in order to facilitate the execution of this present trust they were expressly empowered to) sell the real estate. And it was thereby declared (but without prejudice to the auxiliary power of sale thereinbefore expressed to be thereby given) that on the sale by any persons not seised of the legal estate the persons in whom the legal estate should be vested should execute all assurances for effectuating such sale as the persons by whom such sale should be made should direct. And upon further trust that the trustees should convert into money the personal estate (except household furniture and effects which were to be held in trust for the widow absolutely) and should hold the moneys to arise by such sale and conversion of the real and personal estate, after paying thereout John Baxandall's debts, funeral and administration expenses and duties, upon trust to invest the same in the securities therein mentioned and to hold the moneys and securities (thereinafter called the trust fund) upon trust to pay the interest, dividend, and annual produce thereof to the widow for life, and after her decease as to the capital and income of the trust fund upon trust for the defendant Emily Crowther absolutely.

It was also declared that the trustees might postpone the sale of

the real estate for so long a period as they should think fit, and that whilst the real estate should continue unsold it should be held by the trustees upon such trusts as should as nearly as the nature of the property would admit correspond with the trusts thereinbefore declared concerning the trust fund, and the trustees should have all powers of managing the real estate which should be necessary for obtaining the full benefit thereof.

This settlement was registered at Wakefield on October 24, 1885, under the Yorkshire Registries Act, 1884.

John Baxandall was not seised of any property in City Road, Bradford, but in 1887 the widow purchased 122, City Road, Bradford, from J. P. Wilson and E. Wilson and their mortgagees. The property was conveyed to her by an indenture of November 1, 1887, which was registered at Wakefield on December 9, 1887. A subsequent mortgage of November 5, 1894, and a reconveyance of November 5, 1895, were also duly registered.

In or about October, 1891, the defendant Emily Crowther submitted to the plaintiffs a proposal in writing for a loan of 300*l.* upon the security of her reversionary interest under the settlement describing the trust property as 112, City Road (meaning 122, City Road), Bradford, a house in Plevna Terrace, Bingley, and a 600*l.* mortgage. The plaintiffs then inquired of the trustees, who with the knowledge and privity of the defendant Emily Crowther stated in writing that the trust property consisted of 122, City Road, Bradford, 2, Plevna Terrace, Bingley, and the 600*l.* mortgage. After a valuation of these houses at the expense of the defendant Emily Crowther and in reliance upon the above representations, which were erroneous in stating that 122, City Road formed part of the settled property, the plaintiffs lent the defendant Emily Crowther 300*l.* upon the security of her reversionary interest as so stated.

By a mortgage made January 11, 1892, between the defendant Emily Crowther of the one part and the plaintiffs of the other part, reciting the death of John Baxandall and the settlement of September 9, 1885, it was witnessed that in consideration of the sum of 300*l.* paid by the plaintiffs to the defendant Emily Crowther the defendant Emily Crowther covenanted to pay the plaintiffs on July 11, 1892, the sum of 300*l.* with interest in the

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meantime at 6*l.* per cent. per annum, and also that in case the said sum of 300*l.* should not be then paid the plaintiffs should be at liberty to accumulate and retain interest at the rate aforesaid upon the said sum or such part thereof as should for the time being remain unpaid, and the defendant Emily Crowther as beneficial owner conveyed and assigned to the plaintiffs all and singular her part share and interest of and in the thereinbefore recited hereditaments, real estate, and personal estate and effects to which she was entitled under and by virtue of the recited settlement and the proceeds thereof, and of and in all and any the stocks, funds, and securities in or upon or of which the same or any part thereof might be invested or consist or by which the same might be represented, howsoever the same respectively might be invested, circumstanced, secured, or described, and the income and accumulations thereof respectively subject to redemption and reconveyance on payment of the principal and other moneys thereby secured.

The interest was reducible to 5 per cent. on punctual payment. It was paid up to January 11, 1895, after which it was left to accumulate at 6 per cent.

This mortgage was not registered, but notice was given to the trustees on January 14, 1892.

On January 1, 1895, the defendant Emily Crowther mortgaged her reversion in 2, Plevna Terrace, which was still unsold, to a mortgagee, who on June 3, 1897, transferred it to a transferee, who on July 25, 1903, conveyed it under his power of sale to the defendant Sarah Lister subject to the widow's life estate under the settlement. The mortgage, transfer, and conveyance were respectively registered at Wakefield on January 7, 1895, October 12, 1900, and July 29, 1903, and were admittedly taken after proper search in the registry and without any notice of the plaintiffs' mortgage. Notices were also sent to the trustees, but these notices were of course later than the plaintiffs' notice.

The trustee Samuel Lund died in 1895.

On October 21, 1912, the widow died intestate and the reversionary interest of the defendant Emily Crowther under the settlement fell into possession. At the same time she became seised of 122, City Road, Bradford, as her mother's heir-at-law.

On December 21, 1912, the surviving trustee Tom Crowther died, and on February 20, 1913, new trustees were appointed.

On March 13, 1913, the defendant Emily Crowther conveyed 122, City Road, Bradford, to the defendants Fox and Bradley by way of statutory mortgage for securing the payment of a sum of 100*l.* then owing to them, which was to be paid with interest on September 13, 1913. This mortgage was registered at Wakefield on March 19, 1913.

The evidence shewed that prior to the date of this mortgage the defendants Fox and Bradley were fully aware that the plaintiffs had advanced their money on the faith of the statements by the defendant Emily Crowther and the trustees that 122, City Road, Bradford, was included in the settlement and that the plaintiffs were claiming an equitable charge thereon accordingly. The defendants Fox and Bradley, however, ascertained that the City Road property was not in fact included in the settlement and, not being familiar with the law of equitable estoppel, they did not consider that the plaintiffs had any charge thereon. They were apprehensive, however, that the plaintiffs might get judgment and issue execution on this property, and they therefore took a mortgage to protect themselves.

On April 10, 1913, the plaintiffs brought this action against the defendants Emily Crowther, Fox and Bradley, and Sarah Lister for an account and foreclosure or sale, and a declaration that their security upon 122, City Road, Bradford, or the proceeds of sale thereof, had priority over the mortgage to the defendants Fox and Bradley, and that their security upon 2, Plevna Terrace, or the proceeds of sale thereof, had priority over the claims of the defendant Sarah Lister.

No charge of fraud was made against any of the defendants. The defendant Emily Crowther put in a defence but did not appear at the hearing. The defendants Fox and Bradley relied on the fact that 122, City Road was not actually included in the settlement, and all the appearing defendants relied on the non-registration of the plaintiffs' mortgage under the Yorkshire Registries Act, 1884. (1)

(1) The Yorkshire Registries Act, 1884, provides as follows:— Sect. 4. "From and after the commencement of this Act . . . .

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On the construction of the settlement the Court held, in opposition to the defendants' contention to the contrary, that the settlement created a trust for sale, and not a mere power of sale, so that the real estate was converted. The case is reported on this footing, the arguments and judgment on construction being omitted.

Hon. Frank Russell, K.C., and *Simpkin*, for the plaintiffs. Having regard to the representations on the faith of which the plaintiffs took their mortgage, the defendant Emily Crowther was bound by equitable estoppel to treat 122, City Road as included in the settlement: *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1); and when on her mother's death she really acquired the property she was bound to make good her representation modo et forma: *In re Bridgwater's Settlement.* (2) The plaintiffs therefore became mortgagees of the proceeds of sale of 122, City Road, and the trust for sale could not be put an end to without their consent.

The defendants Fox and Bradley had full notice of the representations made by the defendant Emily Crowther, their mortgagor, and are bound by the same equitable estoppel. The only question is whether they and the defendant Sarah Lister, who had no notice of the plaintiffs' mortgage, have acquired any

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all assurances executed or made after the commencement of this Act . . . . by which any lands within any of the three ridings are affected may be registered under this Act."

Sect. 14. "Subject to the provisions of this Act, all assurances entitled to be registered under this Act shall have priority according to the date of registration thereof, and not according to the date of such assurances, or of the execution thereof. . . . . All priorities given by this Act shall have full effect in all Courts, except in cases of actual fraud, and all persons claiming thereunder any legal or equitable interests shall be entitled to corresponding priorities, and no such person shall lose any such priority merely in consequence of his having been affected with actual or constructive notice, except in cases of actual fraud; but nothing in this section contained shall operate to confer upon any person claiming without valuable consideration under any person any further priority or protection than would belong to the person under whom he claims; and any disposition of land or charge on land, which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner."

(1) L. R. 6 H. L. 352, 360.

(2) [1910] 2 Ch. 342, 346.

priority by registration. This depends on the question whether the plaintiffs' mortgage was registrable.

Now a mortgage of an interest of the proceeds of sale of land in Middlesex settled in trust for sale does not affect the land "in law or equity" within the Middlesex Registry Act, 1708 (7 Anne, c. 20), and does not require registration under that Act: *Arden* v. *Arden* (1), following *Malcolm* v. *Charlesworth* (2), a case under the North Riding Registry Act, 1735 (8 Geo. 2, c. 6). The same principle must apply to the Yorkshire Registries Act, 1884, as, though s. 4 omits the words "in law or equity," it is clear from s. 14 that equitable interests are included. The plaintiffs' mortgage was therefore not registrable and none of the defendants acquired any priority by registration.

Micklem, K.C., and *John Rutherford*, for the defendants Fox and Bradley. The plaintiffs could easily have ascertained by searching the register that 122, City Road did not belong to John Baxandall and was not included in the settlement, which was only registered in respect of 2, Plevna Terrace. They were not entitled to rely on the representations alone.

If, however, there is a case of equitable estoppel, it does not put 122, City Road into the settlement. It merely feeds the plaintiffs' mortgage with the freehold estate in that property subsequently acquired by the defendant Emily Crowther. There was therefore never a trust for sale in respect of 122, City Road, and the plaintiffs' mortgage became registrable in respect of that property the moment the estoppel took effect, i.e., on the widow's death. They ought then at once to have registered their mortgage and the written representations in respect of 122, City Road. They did not do so, and as there is no case of fraud the registered mortgage to the defendants Fox and Bradley is entitled to priority.

Percy Wheeler, for the defendant Sarah Lister. The plaintiffs' mortgage was registrable under the Yorkshire Registries Act, 1884, as it clearly affected the land within s. 4 and created an equitable interest within s. 14. *Arden* v. *Arden* (1) was a decision on the Middlesex Registry Act, 1708, and does not apply to the Yorkshire Registries Act, 1884.

(1) 29 Ch. D. 702, 707. (2) (1836) 1 Keen, 63.

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It was based on *Malcolm* v. *Charlesworth* (1), a decision on the North Riding Registry Act, 1735, which decision is open to question, and is disregarded in Irish practice, where the point is one of daily occurrence: Davidson's Conveyancing Precedents, 4th ed. vol. ii. pt. ii. p. 219. In *Rodger* v. *Harrison* (2) Lord Esher M.R. said that *Credland* v. *Potter* (3), a decision on the construction of the West Riding Registry Act, 1703 (2 & 3 Anne, c. 4), was no authority on the construction of the Yorkshire Registries Act, 1884. The same principle applies to the authority of *Arden* v. *Arden*. (4) The plaintiffs' contention that after their mortgage the widow and the mortgagor, who was entitled to the whole reversion, and not to a mere share as in *Arden* v. *Arden* (4), could not have put an end to the trust for sale and elected to take the property as land shews that the mortgage affected the land.

Again, *Arden* v. *Arden* (4) is inconsistent with many other authorities and ought not to be followed. For instance, the plaintiffs' mortgage would clearly have affected the land within the meaning of the Mortmain Act, 1736 (9 Geo. 2, c. 36): *Attorney-General* v. *Harley* (5); the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74): *Briggs* v. *Chamberlain* (6); the Intestates Estates Act, 1884 (47 & 48 Vict. c. 71): *In re Wood* (7); and the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27): *In re Fox* (8); and it is submitted that it equally affects the land within the Yorkshire Registries Act, 1884. If so, it was registrable. It was not registered and in the absence of actual fraud the priorities given by the Act prevail: *Battison* v. *Hobson*. (9)

ASTBURY J. (after stating the facts). The defendant Emily Crowther was in Court during the hearing of the action. She did not appear by counsel, but at the conclusion of the other defendants' evidence I asked her if she wished to appear and give evidence. She elected not to do so. Against her, therefore,

(1) 1 Keen, 63.
(2) [1893] 1 Q. B. 161, 167.
(3) (1874) L. R. 10 Ch. 8.
(4) 29 Ch. D. 702, 707.
(5) (1821) 5 Madd. 321.
(6) (1853) 11 Hare, 69.
(7) [1896] 2 Ch. 596.
(8) [1913] 2 Ch. 75.
(9) [1896] 2 Ch. 403.

the action is undefended, and the plaintiffs' case is clearly proved.

As to the defendants Fox and Bradley it was contended that the plaintiffs ought to have searched the register and were not entitled to rely on the representations alone. That contention, if intended to be taken seriously, is unfounded.

In *Bloomenthal* v. *Ford* (1), a common law case of estoppel by representation, Lord Halsbury L.C. said: "My Lords, it appears to me that it is hopeless to contend that, after a representation made by the company for the purpose of inducing a man to act upon it by parting with his money, it is competent for them to turn round and say, 'You should have inquired. You should have observed certain circumstances; and if you had done that you would have been better advised than to advance the money.' . . . . Now, the ground upon which that is suggested appears to be partly a question of law and partly a question of fact. As to the question of law, I confess for myself I entertain a doubt whether it is ever true, in a case where one person has been induced to act by the misrepresentation of another, that you can go beyond the fact whether it is so or not. In arriving at a conclusion upon this question of fact, like every other question of fact, all the circumstances must be considered . . . . but once the conclusion is arrived at that the belief was induced, and intentionally induced, by a misstatement of fact intended to operate upon the mind of another, upon which the man has acted, then I do not think any case can be found in the books in which it has been suggested that the legal consequence does not follow, namely, that there is estoppel, and that it is open to the person who has made the representation to say, 'I told you so-and-so; but you ought not to have believed me.' . . . . If that is the state of the facts at which one arrives in considering the evidence in this case, the legal conclusion cannot be doubted. There is a long series of cases, no one of which it is important to quote, because the proposition of law has never been doubted, so far as I am aware, that if you induce a man to act upon a statement of yours, meaning him to act upon it, and that statement is untrue,

(1) [1897] A. C. 156, 161, 165.

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and he does act upon it because he believes it, it is not competent then for the person who has made the representation to say afterwards, 'I will shew another state of facts than that which I represented, and you ought not to have believed it.'"

In *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1) Lord Selborne L.C. said: "I apprehend that nothing can be more certain than this, that the doctrine of equitable estoppel by representation is a wholly different thing from contract, or promise, or equitable assignment, or anything of that sort. The foundation of that doctrine, which is a very important one, and certainly not one likely to be departed from, is this, that if a man dealing with another for value makes statements to him as to existing facts, which being stated would affect the contract, and without reliance upon which, or without the statement of which, the party would not enter into the contract, and which being otherwise than as they were stated, would leave the situation after the contract different from what it would have been if the representation had not been made; then the person making those representations shall, so far as the powers of a Court of Equity extend, be treated as if the representations were true, and shall be compelled to make them good. But those must be representations concerning existing facts."

There are many decisions to the same effect. In *In re Bridgwater's Settlement* (2) the head-note states that "If an assignor with a defective title purports and intends to assign property for value, any interest subsequently acquired by him in that property is available in equity to make the assignment effectual, even though the defect in title is apparent on the face of the assignment"; and Swinfen Eady J. said: "In these circumstances the decisions of Shadwell V.-C. in *Noel* v. *Bewley* (3) and Kekewich J. in *In re Hoffe's Estate Act*, 1855 (4) are applicable, and the beneficial interest in the entire fund less the 2000*l.* appointed now belongs to the persons deriving title under the mortgage, either under the covenant for further assurance, or on the broader ground preferred by Shadwell V.-C. and

(1) L. R. 6 H. L. 352, 360.
(2) [1910] 2 Ch. 342, 346.
(3) (1829) 3 Sim. 103, 116.
(4) [1900] W. N. 114; 82 L. T. 556.

Kekewich J., that though the assignment was of a defective title, yet as the assignor afterwards acquired a good title, the Court will make that good title available to make the assignment effectual."

The defendants Fox and Bradley took their mortgage of 122, City Road from the defendant Emily Crowther with full notice of the representations on which the plaintiffs lent their money, and their and the defendant Lister's only possible right to priority (if any) is under the Yorkshire Registries Act, 1884. [His Lordship read ss. 4 and 14.]

The question under this Act is whether the plaintiffs' mortgage was an assurance by which any lands as such were affected. In other words, the question is whether the settlement was of such a character that a mortgage of a share thereunder was registrable. This equally affects the defendant Sarah Lister, who had no notice of the plaintiffs' mortgage. [His Lordship then dealt with the question of construction of the settlement and held that though badly drawn it created a trust for sale with a power to postpone. His Lordship continued.]

The settlement therefore converted the real estate into personalty, and it would have required the consent of all the beneficiaries to reconvert it into realty, and after the plaintiffs had taken their mortgage their consent also would have been necessary, and their equitable interest in 122, City Road was really a right to require the defendant Emily Crowther and her assigns with notice to treat that property as vested in the trustees of the settlement which was registered. They therefore obtained as against them a charge on the proceeds of sale of that property as well as on the proceeds of sale of 2, Plevna Terrace.

The plaintiffs relied on *Arden* v. *Arden* (1) to shew that the local Registry Acts were intended to apply only to dealings at law or in equity with the land itself. That was a decision on the Middlesex Registry Act, 1708, and it was held that an incumbrancer upon a share in the proceeds of sale of real estate in Middlesex devised in trust for sale obtained no priority by registration, Kay J. saying that "the Registration Acts are intended to apply to dealings at law or in equity with the

(1) 29 Ch. D. 702, 707.

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land itself, and I am of opinion that this case is not within them."

The defendants contended that this decision was confined to the Middlesex Registry Act, 1708, and that it is inconsistent with other authorities and ought not to be followed. Under the Middlesex Registry Act, 1708, all deeds and conveyances whereby any lands in Middlesex "may be any way affected in law or equity" are registrable. Sect. 4 of the Yorkshire Registries Act, 1884, speaks of "assurances . . . . by which any lands . . . . are affected," but s. 14 makes it clear that the Act extends to equitable interests, so that on this point the Acts are practically identical, and the decision in *Arden* v. *Arden* (1) is equally applicable to both.

It is further contended that the plaintiffs' mortgage would clearly have affected the land within the meaning of the Mortmain Act, 1736: *Attorney-General* v. *Harley* (2); the Fines and Recoveries Act, 1833: *Briggs* v. *Chamberlain* (3); the Intestates Estates Act, 1884: *In re Wood* (4); and the Real Property Limitation Act, 1833: *In re Fox* (5), and that having regard to those decisions I ought not to follow *Arden* v. *Arden.* (1) But those decisions are not really in conflict with *Arden* v. *Arden.* (1) They were decisions on the language of other statutes directed to quite different purposes from those of the Yorkshire Registries Act, 1884. I therefore follow *Arden* v. *Arden.* (1) The plaintiffs' mortgage not being registrable, they are entitled to priority against the defendant Sarah Lister by their prior notice to the trustees. For the same reason they are entitled to priority against the defendants Fox and Bradley, even if on the facts these defendants are entitled to rely on the Yorkshire Registries Act, 1884, at all, a point which in the circumstances I need not decide.

Solicitors: *Devonshire, Monkland & Co.; Windybank, Samuell & Lawrence, for Fox & Bradley, Liverpool; Jaques & Co., for Massey & Co., Bradford.*

(1) 29 Ch. D. 702, 707.
(2) 5 Madd. 321.
(3) 11 Hare, 69.
(4) [1896] 2 Ch. 596.
(5) [1913] 2 Ch. 75.

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C. A.
1914
May 11, 12.

[1912 M. 989.]

Vendor and Purchaser—Contract for Sale of Land—Restrictive Stipulation for Benefit of Adjoining Lands of Vendor—Adjoining Lands sold before Completion of Contract—Covenant running with the Land—Contract superseded by Conveyance.

In December, 1898, the owner in fee of an hotel agreed to sell it to H., the predecessor in title of the plaintiffs. The contract provided that the conveyance should contain a covenant by H. restrictive of the user of the hotel for the benefit of adjoining houses and lands of which the vendor was owner in fee but under a different title. It was a residential neighbourhood, but the contract was no part of a building scheme. The purchase was completed in December, 1899, and the conveyance contained a covenant by H. in the terms of the restrictive stipulation with the executors of the vendor, who had died.

Between the date of H.'s contract and the date of completion all the vendor's houses and lands adjoining the hotel were put up for sale by public auction in lots subject to conditions of sale which made no reference to H.'s contract or to the restrictive stipulation. All the lots were sold and conveyed to various purchasers before December, 1899.

In December, 1912, the plaintiffs sold the hotel to the defendant free from restrictions, knowing that he proposed to erect a music hall on part of the hotel premises. The defendant refused to complete on the ground that the hotel was bound by the restrictive stipulation in H.'s contract and conveyance, and that the erection of a music hall might be a breach of the covenant. In an action for specific performance:—

Held (affirming the decision of Neville J. [1914] 1 Ch. 34), that the material date was not the date of the agreement of December, 1898, but the date of the conveyance of December, 1899; that, as the vendor at that date had no property to which the benefit of the restrictive covenant could attach, the hotel was not subject to any restrictive stipulation; that the agreement was superseded by the conveyance; and, on the construction of the conveyance, that there was no restrictive covenant running with the land.

Appeal from a decision of Neville J. (1)

This was an action for specific performance that raised the question whether a restrictive covenant in the conveyance of a predecessor in title of the plaintiffs was enforceable in these circumstances.

By an agreement in writing dated December 1, 1898, one

(1) [1914] 1 Ch. 34.

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Jones Vere and his trustee, the owners in fee simple of the Crystal Palace Hotel and gardens, agreed to sell that property to Mrs. Alice Hodgkyns subject to the reservation that the vendors "their heirs and assigns owners and occupiers for the time being of the buildings and property adjoining to or in the neighbourhood of the said hotel and gardens and forming part of the estate of the said" vendors should have the right of drainage therein mentioned. The agreement also provided that the purchase should be completed on December 24, 1898, and that the conveyance should contain "a covenant by the purchaser framed so as to bind her heirs and assigns with the vendors their heirs and assigns owners and occupiers as aforesaid . . . . that neither the said hotel and premises nor any part thereof shall at any time be used for any offensive noisy or dangerous trade business pursuit or occupation or any purpose which shall or may be or grow to be in any way a nuisance damage grievance or annoyance to the vendors their heirs and assigns owners and occupiers as aforesaid or which may tend to depreciate or lessen the value of the adjoining or neighbouring property aforesaid or any part thereof as a residential property."

At the date of this agreement Jones Vere was also the owner in fee simple, but under a different title, of houses and lands adjoining or near to the hotel. It was a residential neighbourhood, but the sale of the hotel to Mrs. Hodgkyns was an isolated transaction and formed no part of a building scheme.

In April, 1899, Jones Vere died, and in July, 1899, Luke Hansard and George Russell Rogers, the trustees of his will, put up for sale by public auction in several lots all the testator's houses and lands adjoining or near to the hotel subject to particulars and conditions of sale which made no reference to the Crystal Palace Hotel nor to the agreement of December 1, 1898, nor to the restrictive stipulations therein mentioned. All the lots were sold at or shortly after the auction, and the sales of all the lots were completed by November, 1899. By reason of delay on the part of Mrs. Hodgkyns the sale to her of the hotel premises under the agreement of December, 1898, was not completed until December 29, 1899, and her conveyance contained a restrictive covenant by her that she

did thereby " for herself her heirs executors administrators and assigns and so as to bind the owner or owners of the said hereditaments for the time being covenant with the said Luke Hansard and George Russell Rogers in manner following that is to say that neither the said hotel and premises nor any part thereof shall at any time be used for any offensive noisy or dangerous trade business pursuit or occupation or any purpose which shall or may be or grow to be in any way a nuisance damage grievance or annoyance to the said Luke Hansard and George Russell Rogers as such representatives as aforesaid their heirs or assigns the owners and occupiers " for the time being of adjoining property forming part of the Vere estate " or which may tend to depreciate or lessen the value of the adjoining or neighbouring property or any part thereof as a residential property."

On December 9, 1911, the plaintiffs, who had become entitled to the Crystal Palace Hotel and grounds through or under Mrs. Hodgkyns, entered into a contract with the defendant to sell to him that property. At the time this contract was entered into the plaintiffs were aware that the object of the defendant in negotiating for the purchase of the property was to erect a music hall on the garden of the hotel, and one of the documents of even date contained the following clause: " It is understood that there are no restrictions attaching to the property which will prevent Mr. Lyons from building on the hotel garden a building suitable for a music hall."

The plaintiffs' abstract of title disclosed the agreement of December 1, 1898, and the conveyance of December 29, 1899, and the defendant in his requisitions objected to the title on the ground, amongst other objections, that the property was bound by the restrictive stipulations, and that the erection of the proposed music hall might be a breach of the agreement and covenant against user entered into by Alice Hodgkyns. The plaintiffs insisted that the property was free from restrictions because, when it was conveyed to H. by the Jones Vere trustees in December, 1899, these vendors had no other property to which the benefit of the restrictive covenant could attach. The defendant refused to complete, and the plaintiffs brought this

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action for specific performance. Neville J. made an order for specific performance, and the defendant appealed.

Jenkins, K.C., and *T. T. Methold*, for the appellant. The present question is whether this land is affected at all by the agreement of December, 1898. Neville J. has held that it is not; and if that decision is reversed a question will arise whether the building of a music hall will be prevented by it. The agreement created an equitable right which ran with the land, and it can be enforced by the vendors, their heirs and assigns, owners, and occupiers of the adjoining property, even though they did not know of the existence of the restriction: *Rogers* v. *Hosegood*. (1) That in the present case the restrictive covenant was created by agreement and not by deed makes no difference. The obligation clearly attached to the land in the hands of Mrs. Hodgkyns. She herself purchased part of the adjoining land at the auction, and she must have the benefit of the restriction now that the hotel has passed into other hands. The present occupiers of the adjoining land are expressly covenantees under the agreement, although not under the deed of conveyance, and the covenant attaches to the land itself for their benefit. If the conveyance had been executed before the adjoining land was sold it is clear that the hotel property would have been bound in its favour. The owners of the adjoining land could have enforced the covenant. After the agreement Mrs. Hodgkyns was in equity the owner of the hotel property and could deal with it subject to the rights of the vendor. It is true that the agreement only says that a covenant shall be included in the conveyance, but equity treats that as if the covenant were already made and she were bound by it. If she had taken possession before the conveyance and had proposed to commit a breach of the agreement she would have been restrained in equity. Her liability would not depend upon whether the covenant ran with the land: *Tulk* v. *Moxhay*. (2) If the covenant does run with the land the appellant cannot safely build a music hall on it. The intention was that the owners of the adjoining lands should be able to enforce the covenant, and that the conveyance should carry out the agreement;

(1) [1900] 2 Ch. 388, 398, 406. (2) (1848) 2 Ph. 774.

but Neville J. has held that that intention was not carried out, and we submit that his decision was wrong. "The rights to be enjoyed with a house to be built are to be determined, not at the time of the conveyance, but of the contract for the purchase of the site": Norton on Deeds, p. 270, citing *Broomfield* v. *Williams* (1), *Pollard* v. *Gare* (2), and *Godwin* v. *Schweppes*. (3) A valid contract actually changes the ownership of the estate in equity: *In re Thomas*. (4) At all events the title is too doubtful to be forced upon us.

Peterson, K.C., and *J. H. Redman*, for the respondents. There is no case in which an agreement for a restrictive covenant has been held to run with the land unless it has been contained in a deed under seal. Restrictive covenants have been held to be negative easements, and easements can be created only by deed: *Hewlins* v. *Shippam* (5); *Wood* v. *Leadbitter* (6); *Reid* v. *Bickerstaff*. (7) But the appellant is not entitled to refer to the agreement at all; it has been superseded by the conveyance: *Teebay* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (8) In the agreement the covenant was to be with "the vendors their heirs and assigns owners and occupiers as aforesaid"; but in the conveyance the covenant actually entered into was with Vere's executors. It was expressly altered to suit the altered circumstances. The conveyance was executed and the previous contract cannot be referred to: *Wheeldon* v. *Burrows* (9); *Leggott* v. *Barrett* (10); *Greswolde-Williams* v. *Barneby*. (11) In this case there was no contract for sale unless and until certain conditions were fulfilled. If the agreement was not carried out the covenant ceased to attach if it ever had attached. At any time before conveyance the vendor and purchaser could have put an end to the contract, which shews that the covenant never did attach. If the covenant in the agreement did attach to the land the agreement ought to be abstracted; and no one ever heard of an agreement for sale forming part of an abstract of

(1) [1897] 1 Ch. 602, 616.
(2) [1901] 1 Ch. 834.
(3) [1902] 1 Ch. 926.
(4) (1886) 34 Ch. D. 166.
(5) (1826) 5 B. & C. 221.
(6) (1845) 13 M. & W. 838.
(7) [1909] 2 Ch. 305.
(8) (1883) 24 Ch. D. 572.
(9) (1879) 12 Ch. D. 31, 60.
(10) (1880) 15 Ch. D. 306.
(11) (1900) 83 L. T. 708.

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title or being in operation till the conveyance was executed. Restrictive covenants cannot be annexed to land by agreement: *Spencer's Case.* (1) At the date of this conveyance there was no dominant tenement to which the benefit of the covenant could attach; therefore there was no servient tenement subject to a burden.

T. T. Methold in reply. Where a conveyance only carries out the contract it does not override it, and the rights of the vendor and purchaser are bound by it. Regard must be had to all the circumstances of the case: *Birmingham, Dudley and District Banking Co.* v. *Ross.* (2) A mere contract to sell a house may create an implied grant of light over the adjoining land: *Beddington* v. *Atlee.* (3)

COZENS-HARDY M.R. This is an appeal from the judgment of Neville J., and it raises a question in an action for specific performance whether a restrictive agreement—I advisedly do not say covenant—contained in a contract for sale, but not found in the conveyance, will affect the defendant as purchaser under the contract, he having notice both of the agreement and of the conveyance? I think this case may really be decided upon the terms of the contract for sale and the conveyance, but having dealt with that I wish to say a few words on the more general question that has been raised.

On December 1, 1898, Mr. Vere and Mr. Rogers, who was really a trustee for Vere, entered into a contract with Alice Hodgkyns. There had been disputes between the parties, which are quite immaterial here, but with a view of compromising the disputes and an action this agreement was entered into, that "if the purchaser shall duly make the payment by clause 14 hereinafter agreed to be made and shall procure the due execution of such deed of release as in clause 15 hereinafter mentioned the vendors will sell and the purchaser will purchase" for 5500*l.* the property known as the Crystal Palace Hotel, then subject to a lease for ninety-nine years which would not expire until the middle of this century. The other stipulations in the

(1) (1583) Sm. L. C., 11th ed. vol. i. p. 55.
(2) (1888) 38 Ch. D. 295.
(3) (1887) 35 Ch. D. 317.

contract are not material until we come to clauses 12, 13, 14, and 15.

Clause 12 is:—"The said conveyance shall expressly except and reserve to the vendors their and each of their heirs and assigns the owners and occupiers for the time being of the buildings and property adjoining to or in the neighbourhood of the said hotel and premises agreed to be sold First the free passage and running of water and soil from such adjoining or neighbouring property (whether under demise or not) by and through the channels and drains belonging and to belong to the said hotel and premises the vendors their heirs and assigns owners and occupiers as aforesaid paying their shares and proportions of the charges of cleansing and repairing the said channels and drains when necessary And secondly the right and liberty at any time hereafter to rebuild or alter any of the adjoining or neighbouring buildings and to erect new buildings on the adjoining or neighbouring land or any part thereof notwithstanding any interference thereby caused to the access of light or air to the said hotel and premises or any part thereof or any new buildings which may be hereafter erected upon any part of the said ground hereby agreed to be sold."

Clause 13: "The said conveyance shall also contain a covenant by the purchaser framed so as to bind her heirs and assigns with the vendors their heirs and assigns owners and occupiers as aforesaid First that during the life of the said Jones Vere no opening lights or windows shall without his consent in writing first had and obtained be put into the extreme north-western or southern walls of any additional storeys which may be added to the said hotel and buildings now standing on the said ground hereby agreed to be sold And that during the same period no openings lights or windows which would overlook the adjoining or neighbouring land of the vendors shall without such consent as aforesaid be put into any new buildings which may hereafter be erected upon any part of the said ground And secondly that neither the said hotel and premises nor any part thereof shall at any time be used for any offensive noisy or dangerous trade business pursuit or occupation or any purpose which shall or may be or grow to be in any way a nuisance

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damage grievance or annoyance to the vendors their heirs and assigns owners and occupiers as aforesaid or which may tend to depreciate or lessen the value of the adjoining or neighbouring property aforesaid or any part thereof as a residential property."

Clause 14: "The purchaser shall also make the following payments to the vendors before the completion of the said purchase in respect of the compromise of the said action viz.:—

"(*a*) A sum equal to the rent payable under the said lease of the 1st day of December 1853 from the 29th day of September 1895 until the date of the actual completion of the purchase.

"(*b*) The sum of 52*l.* 10*s.* as an agreed sum in respect of the costs of the said George Russell Rogers of and incident to the said action and

"(*c*) The amount of the costs of the vendors of and incident to the preparation and execution of the deed of release and indemnity to be executed in pursuance hereof as mentioned in the next following clause."

Clause 15: "The purchaser shall also before the completion of the said purchase procure that the persons entitled to the benefit of the said deed of covenant of the 20th day of October 1880 execute and deliver to the said Jones Vere a proper deed of release effectually releasing the said Jones Vere and Eliza Ogle their and each of their heirs executors and administrators and the estates and effects of the said Thomas Joseph Jones and Ellen Jones from the said sum of 7500*l.* and interest and from all actions proceedings claims and demands in respect thereof or otherwise under the said deed of covenant and the purchaser shall be a party to such deed of release and shall thereby covenant to effectually indemnify the said Jones Vere and Eliza Ogle and the estates and effects of the said Thomas Joseph Jones and Ellen Jones from the said sum of 7500*l.* and interest and from all actions proceedings claims demands costs charges and expenses in respect thereof or in anywise relating to or arising in respect of the said deed of covenant such deed of release and indemnity to be prepared by the said Jones Vere."

As a matter of construction what is the effect of that agreement? In my opinion it is nothing more than an agreement

that certain obligations shall be found in the conveyance when executed and that the purchaser shall not object to execute such conveyance, but there is nothing whatever in the terms of this special contract making the contract itself, apart from the conveyance to be executed, anything which could be a binding arrangement not merely between the parties themselves by way of contract, but as affecting the land which was agreed to be sold.

Now I must mention how the dispute arose. Vere, the vendor, died in April of the same year; his executors in the same year sold all the adjoining property for the benefit of which the restrictive agreement was intended to operate. All those conveyances were completed and no one of them contained any mention of this contract or even purported to assign the benefit of the restrictive agreement. After all the adjoining property had been sold and completed the conveyance of this property was executed, and this is the conveyance which was executed: it recites the contract that Vere was equitably entitled; it recites the contract for sale; it recites the death of Vere, and it recites that Alice Hodgkyns also agreed to enter into the covenant on her part thereinafter contained. That is the only obligation to be found in the recitals. Then there is the conveyance, on which nothing turns till we come to the covenant, and the covenant is in these terms: "And the said Alice Hodgkyns doth hereby for herself her heirs executors administrators and assigns and so as to bind the owner or owners of the said hereditaments for the time being covenant with the said Luke Hansard and George Russell Rogers in manner following." They were the executors and trustees of the will of Vere. I pause there. There are no words of limitation; the covenant is only with Hansard and Rogers in manner following. Then it goes on to say: "That neither the said hotel and premises nor any part thereof shall at any time be used for any offensive noisy or dangerous trade business pursuit or occupation or any purpose which shall or may be or grow to be in any way a nuisance damage grievance or annoyance to the said Luke Hansard and George Russell Rogers as such representatives as aforesaid their heirs or assigns or the

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owners and occupiers as aforesaid or which may tend to depreciate or lessen the value of the adjoining or neighbouring property aforesaid or any part thereof as a residential property."

It has not been seriously argued—it has just been hinted at—that on the construction of the covenant in the conveyance the present appellant can make out any case at all. It seems to me that this covenant is plainly in its terms not one which can create any obligation as between the subsequent purchasers on either side within the well-settled principle applicable to the case; and on that short ground, that the only obligation in the contract was to enter into certain covenants in the conveyance, and that when we look at the conveyance itself we find that the covenant which was thereby entered into did not insert or impose the obligation which is now complained of, I think this appeal must fail and the view taken by Neville J. was quite right.

But we have heard a very interesting and able argument putting the matter on more general grounds, and I think perhaps it is right that I should, very shortly, say how the matter strikes me. Mr. Jenkins and Mr. Methold say this: Whenever you have a contract in writing, that makes in equity the purchaser the owner of the estate, and if by the contract there is anything in the nature of a restrictive agreement, that creates an interest in the whole of the estate which at the date of the agreement was intended to be protected by the agreement, and that the benefit of that inheres to every part of the estate in this sense, that the purchasers of the adjoining property, although they knew nothing about it, took the benefit of it; and *Rogers* v. *Hosegood* (1) is cited for that purpose. I think that that is a mistake and, if I may venture to say so, a dangerous mistake. It is a mistake because, speaking generally, it is perfectly clear that when you have a conveyance which expresses the final concluded deliberate terms of the contract between the parties you cannot affect or alter that by reference to the antecedent contract. The case which Mr. Peterson referred to of *Leggott* v. *Barrett* (2) puts that extremely strongly. I will read what Brett L.J. said: "I entirely agree with my

(1) [1900] 2 Ch. 388. (2) 15 Ch. D. 306, 311.

Lord that where there is a preliminary contract in words which is afterwards reduced into writing, or where there is a preliminary contract in writing which is afterwards reduced into a deed, the rights of the parties are governed in the first case entirely by the writing, and in the second case entirely by the deed; and if there be any difference between the words and the written document in the first case, or between the written agreement and the deed in the other case, the rights of the parties are entirely governed by the superior document and by the governing part of that document." It makes no difference that the prior agreement is itself recited in the conveyance. I think, therefore, that the argument which has been put forward on a general rule, quite apart from the terms of this particular contract, is one that has no foundation in law, and I venture to describe it as dangerous. I see no answer to the point that was made by Mr. Peterson that, if that be the true view, in every case the agreement for sale antecedent to the conveyance will become a document of title and must be put in the abstract, and anything more dangerous or more revolutionary for the purpose of conveyancing than such a view cannot, I think, be well imagined. If I wanted a clear authority in favour of the respondents and against the appellant I think I should find it in the case of *Birmingham, Dudley and District Banking Co.* v. *Ross* (1), which seems to me to be distinctly and plainly adverse to the contention which has been raised by Mr. Jenkins and Mr. Methold.

For these reasons I think the view taken by Neville J. was quite right, and this appeal must be dismissed with costs.

Swinfen Eady L.J. I am of the same opinion. In the contract for sale to Mrs. Hodgkyns, a contract for sale of an interest subject to a lease, the lease expiring in 1951, the vendors having some other property, there is no provision or restriction in positive terms with regard to the way in which the property agreed to be sold might be used until we come to the form of the conveyance, and it is in clause 13, relating to the form of the conveyance, that alone is the restriction to be found. Clause 13 provides for the insertion of a covenant in the

(1) 38 Ch. D. 295.

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conveyance by the purchaser framed so as to bind her heirs and assigns with the vendors, their heirs and assigns, owners and occupiers as aforesaid. Then it sets out secondly the language that is to be inserted in the covenant that neither the hotel nor the premises nor any part thereof shall at any time be used except as a residential property. That is the only reference to the restriction. It then appears that after this contract was entered into, but before the conveyance was made pursuant to it, the whole of the property referred to in this agreement as the "adjoining or neighbouring property aforesaid" was sold and conveyed away by the vendors, so that at the time when they executed the conveyance of the property comprised in the agreement they had no remaining property left in them for the benefit of which they could take the covenant; and consequently when the conveyance was framed the language of it departed from the language of the agreement. According to the agreement the conveyance was to contain a covenant with the vendors, their heirs and assigns, owners and occupiers as aforesaid; but at the date of the conveyance the vendors were not owners and occupiers as aforesaid—they had sold and conveyed away all the land in question. Accordingly when we come to the conveyance the language of it differs from the language of the covenant because the circumstances have changed and the language is adapted to the changed circumstances. The language of the covenant is: [His Lordship read the clause.] It no doubt shews an intention on the face of the conveyance that the burden shall, being annexed to and running with the land, bind the land conveyed. The purchaser covenants with Hansard and Rogers "in manner following that is to say." There is no evidence of any intention to annex the benefit of the covenant to any land whatever. The language of the covenant is not to do anything that will be an annoyance or nuisance, and so on, to Hansard and Rogers "their heirs and assigns" or the owners and occupiers as aforesaid, but the covenant is merely a covenant with these two persons Hansard and Rogers, not as owning any land, because they had not any land, and it is not expressed to be entered into with them in respect of any land, but only that the covenantor was not to do

anything to cause damage or annoyance to them or their assigns. On the language of the agreement I think it is manifest it was not the intention of the parties to affect the land until conveyance. There is no independent agreement as to the way in which the land should be used; the only contract is that the conveyance is to go in a particular form, and unless and until the conveyance is executed there is nothing to bind the land. In my opinion it was quite open to the parties, as well before as after the adjoining or neighbouring land had been conveyed away by the vendor, to determine this agreement. The purchaser might not have completed the contract, there might have been difficulties, and it was quite open to the parties to agree to put an end to the contract and determine the purchase. Under those circumstances the land would not have been conveyed at all under the original contract—the vendor could have entered into a fresh contract with a different purchaser on different lines.

The case of *Rogers* v. *Hosegood* (1) established that where the benefit of a restrictive covenant has been clearly annexed to a piece of land then the assigns of the land will take the benefit of the restrictive covenant as annexed to the land; but in the present case there is no covenant annexed to the land in any way. I think what Cozens-Hardy M.R. said in *Reid* v. *Bickerstaff* (2) is applicable to this case: "The benefit of a covenant capable of being annexed to land, but not expressed to be so annexed, either by the deed containing the covenant or by some subsequent instrument executed by the covenantee, does not pass as an incident of land on a subsequent conveyance." This is a much stronger case, because there is no covenant at all affecting the land until conveyance, and then the vendors have ceased to own any land to which the benefit of the covenant can be annexed.

Then there is the further and much wider question that has been argued. In this case, differing from many, the contract is put upon the title—it had to be having regard to the circumstances under which it was entered into—and the contract is recited in the conveyance, but if the argument that has been

(1) [1900] 2 Ch. 388. (2) [1909] 2 Ch. 305, 320.

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addressed to us is well founded, and if the mere contract was to bind the land, there would have to be in every case an agreement put on the title which would revolutionize the practice of conveyancing. Not only that, but it would be a departure from the well-established principles that when you have negotiations leading up to a contract you do not look at the negotiations to construe the contract in writing, you only look to the written contract, and so where there is a contract followed by a conveyance you look at the terms of the conveyance. *Leggott* v. *Barrett* (1) is very explicit on that point; it was treated as settling the law, and is constantly referred to as having done so. James L.J. said: "It is very important, according to my view of the law of contracts, both at common law and in equity, that if parties have made an executory contract which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and that you have no right whatever to look at the contract, although it is recited in the deed, except for the purpose of construing the deed itself. . . . . A recital of the agreement in such deed would have the same effect as an ordinary preamble to an Act of Parliament, or any other instrument, as shewing what the object of the parties was, and what they were about to do, so as to afford a guide to the construction of their words; but you have no right for any other purpose to look at anything but the deed itself, unless there be a suit for rescinding the deed on the ground of fraud, or for altering it on the ground of mistake." Here there is nothing of the kind, and the deed is complete in itself.

I am satisfied that the judgment below is right and that this appeal fails.

PICKFORD L.J. I am of the same opinion.

Solicitors: *Maxwell & Dampney; Woodcock Ryland & Parker.*

(1) 15 Ch. D. 306, 309.

H. C. R.

JOYCE J.
1914
April 23; May 6.

In re WEDGWOOD.
SWEET *v.* COTTON.

[1914 W. 255.]

Will — Legacy to "Saint Mary's Home for Women and Children of 15 Wellington Street Chelsea"—Change in Controlling Body and Change of Site in Lifetime of Testatrix—Continuity of Home—Good Charitable Bequest for a definite Charitable Object—No Lapse.

Testatrix bequeathed a legacy of 1000*l.* "To Saint Mary's Home for Women and Children of 15 Wellington Street Chelsea." By a codicil she reduced to 500*l.* the amount of all charitable legacies given by her will exceeding 500*l.*, and in other respects she confirmed her will:—

Held, that the bequest was a perfectly good and valid charitable bequest for a definite charitable object, namely, the work carried on at or in connection with St. Mary's Home, and that the legacy had not lapsed notwithstanding the facts that between the date of the will and the codicil the carrying on of the rescue and preventive work at St. Mary's Home had been transferred from one association to another, though without any break in the continuity of the home or of the work carried on there, and that between the date of the codicil and the testatrix's death St. Mary's Home was removed from 15, Wellington Square—not 15, Wellington Street, as described in the will—to 14, Trafalgar Square, Chelsea.

Held, further, that neither of the associations above mentioned was entitled to the legacy, but that the same must be applied under a scheme for the benefit of St. Mary's Home, unless the Attorney-General consented to the legacy being paid to one of the defendant associations on an undertaking to apply it for St. Mary's Home.

Adjourned Summons.

By her will, dated April 16, 1908, the testatrix appointed the plaintiffs her executors, and by clause 4 of her will, amongst a great number of other charitable legacies, gave the following: "To Saint Mary's Home for Women and Children of 15 Wellington Street Chelsea one thousand pounds," and the testatrix declared that the respective receipts of the respective treasurers of the named institutions should be a sufficient discharge for the said legacies respectively.

By a codicil dated March 20, 1911, the testatrix revoked so much of each of the legacies given by clause 4 of her will as exceeded 500*l.* and declared that the clause should be read and construed as if the sum of 500*l.* had been originally inserted

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therein instead of such sum therein mentioned which exceeded 500*l.*; and after certain other alterations of her will not material to be mentioned, the testatrix in all other respects confirmed her said will. She made a second codicil to her will not affecting the above-mentioned legacy, and subject thereto confirmed her said will.

The testatrix died on October 7, 1913, and her will was duly proved by the plaintiffs.

The facts relating to St. Mary's Home and to the changes in its controlling body and situation between the date of the will and the death of the testatrix are fully set out in his Lordship's judgment.

The plaintiffs took out this summons for the determination inter alia of the question whether (*a*) the defendants the Chelsea Association for Rescue and Preventive Work, or (*b*) the defendants the Belgravia and Pimlico Association for the Care of Friendless Girls, or (*c*) any other and what society, association, or institution was entitled to the above-mentioned legacy of 500*l.*

Bischoff, for the plaintiffs.

Howard Wright, for the defendants the Chelsea Association. I submit that on the evidence this association is entitled to the legacy.

E. A. Digby, for the defendants the Belgravia and Pimlico Association.

Dighton Pollock, for the defendants the residuary legatees. The charity in existence at the date of the will is clean gone and there is a lapse. That charity came to an end in April, 1909, before the last codicil confirming the will, and at the date of the last codicil there was no such charity in existence. It is not enough that the same work is carried on in another place under another name; if the society loses its identity, then it disappears—*In re Rymer* (1)—and the legacy lapses and is not applicable cy près: *In re Orey* (2).

In re Faraker (3) is distinguishable on the ground that that

(1) [1895] 1 Ch. 19. (2) (1885) 29 Ch. D. 560.
(3) [1912] 2 Ch. 488.

was the case of an endowed charity and could not be destroyed and was not extinct. The home named in the will in the present case has ceased to exist and there is now nothing answering to the description of the charity so named, and the estate of the testatrix cannot in the circumstances be bound by this bequest.

Austen-Cartmell, for the Attorney-General. For all practical purposes connected with this legacy the St. Mary's Home referred to in the will and the existing St. Mary's Home are identical: *In re Magrath.* (1)

[JOYCE J. A mere change of name does not cause a lapse: Halsbury's Laws of England, vol. iv. p. 156.]

It is immaterial that the institution has become amalgamated with another institution, and a legacy given to each of the institutions which amalgamated will be paid to the combined institutions: *In re Wilson's Will* (2); *In re Joy* (3); Tudor on Charities and Mortmain, 4th ed. p. 152.

In *In re Rymer* (4) the particular work had ceased to be carried on, but that is not so in the case of this bequest, which is to the persons who carry on a certain work; that work is still being carried on, and it is not material, when the charity exists, what is the machinery which carries it on. When the Chelsea Association took over this work the mere machinery changed but not the work, and just the very thing happened which Farwell L.J. described in *In re Faraker* (5) when he said "In all these cases one has to consider not so much the means to the end as the charitable end which is in view, and so long as that charitable end is well established the means are only machinery, and no alteration of the machinery can destroy the charitable trust for the benefit of which the machinery is provided." If the local habitat of this home had not been changed it would not have been arguable that it did not take, and I submit that the change of habitat to a home not more than fifty yards away makes no real difference. This is not a case of succession or amalgamation, for the charity has all along remained, the only

(1) [1913] 2 Ch. 331.
(2) (1854) 19 Beav. 594.
(3) (1888) 60 L. T. 175.
(4) [1895] 1 Ch. 19.
(5) [1912] 2 Ch. 495.

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change being in the machinery for carrying it on. If this view is right, the Court need not consider the cases of succession or amalgamation, although they are really illustrations of the same principle, and shew that succession or amalgamation may take place and not avoid the legacy : *In re Joy* (1) ; *In re Wilson's Will* (2) ; *In re Adams* (3) ; *Makeown* v. *Ardagh* (4) ; *In re Webster*. (5)

Howard Wright in reply.

Cur. adv. vult.

May 6. JOYCE J. The question raised in this case is as to the validity of a bequest of 500*l*. " To Saint Mary's Home for Women and Children of 15 Wellington Street Chelsea." It has been contended amongst other things that the legacy lapsed by reason of certain subsequent events in the lifetime of the testatrix.

There are two claimants, namely, the Chelsea Association for Rescue and Preventive Work, or, if that claim fails, the bequest is claimed by the Belgravia and Pimlico Association for the Care of Friendless Girls.

At the date of the will there was a Pimlico Ladies' Association whose object was what is called preventive and rescue work among women in Pimlico and the neighbourhood. They had several homes, one of them called St. Mary's Home being at 15, Wellington Square,—not Wellington Street—Chelsea, where they rented a house which was used for the reception of unfortunate unmarried women and girls with their infants and the training of the mothers for domestic service. There were separate officials and committees for each home.

Later, in 1908, a Chelsea association was formed for precisely similar work. An arrangement was made as to the several areas in which the two societies should carry on their operations, and St. Mary's Home being within the district of the Chelsea Association, the management fell to that association. The Pimlico Ladies' Association changed its title and became the

(1) 60 L. T. 175.
(2) 19 Beav. 594.
(3) (1888) 4 Times L. R. 757.
(4) (1876) I. R. 10 Eq. 445.
(5) [1912] 1 Ch. 106.

Belgravia and Pimlico Association for the Care of Friendless Girls. The nature and objects of the two associations were the same as those of the original Ladies' Association.

From January 1, 1909, this particular home, St. Mary's, was managed by practically the same committee as before, but under the Chelsea Association, the previous subscribers to this home for the most part continuing their subscriptions. There was no break in the continuity of the institution, if it could properly be so called. The very same charitable work was carried on at the same place but, in form, under slightly different management. There was no material alteration in substance.

The legacy in question is not given to any person or association, but really for a charitable purpose or object, namely, the carrying on of the work of St. Mary's Home, which never was a separate institution, but rather a department of the charitable work originally of the Ladies' Association and then of the Chelsea Association.

If the testatrix had died during the first quarter of the year 1909, I do not myself see what possible question there could have been as to the object or validity of the bequest.

The tenancy of 15, Wellington Square being about to expire on Lady Day, 1909, an arrangement was made for its continuation for a further six months, but the owners or owner declining to renew the tenancy it became necessary to find another habitation, and ultimately the home, that is, St. Mary's Home, was moved to another place within a short distance of Wellington Square, namely, to 14, Trafalgar Square, in Chelsea or Brompton, and thenceforward down to the present time precisely the same work has been carried on there by the same agency under the same title of St. Mary's Home.

The testatrix by the fourth clause of her will had given several charitable legacies, and among others "To Saint Mary's Home for Women and Children of 15 Wellington Street Chelsea one thousand pounds." By a codicil dated March 20, 1911, she amongst other things, by the second clause revoked so much of the legacy given by the fourth clause of her will as exceeded 500*l.*, and by the seventh and last clause of the codicil she in all other respects confirmed her said will. With reference to the

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effect of those confirmatory words I may refer to what Stirling L.J. said in *In re Fraser* (1): "The effect of this is to bring the will down to the date of the codicil, and effect the same disposition of the testator's estate as if the testator had at that date made a new will, containing the same dispositions as the original will, but with the alterations introduced by the various codicils."

In the circumstances of the present case, but for the change of address of St. Mary's Home in 1909 from 15, Wellington Square to 14, Trafalgar Square, the objections to the bequest raised by the residuary legatee would hardly in my opinion have been arguable. Why should the change of address make any difference? In my opinion it makes no material difference, especially having regard to the confirmation of the will—including the bequest now in question—by the codicil.

Suppose the will containing the original bequest had been made in 1911, the inaccuracy or error in the local description of the home would not in my opinion have invalidated the bequest. The result is that in my opinion neither of these claimants is strictly entitled to the legacy, but it is a perfectly good and valid charitable bequest for a definite charitable object, namely, the work carried on at or in connection with St. Mary's Home. If the Attorney-General insists on it there must be a scheme for the application of this money for St. Mary's Home, but if he assents the money may be paid to the Chelsea Association on their undertaking that it shall be applied to St. Mary's Home.

Solicitors: *Iliffe, Henley & Sweet; Tatham & Procter; Treasury Solicitor; Wynne-Baxter & Keeble.*

(1) [1904] 1 Ch. 726, 734.

R. M.

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April 3, 6; *May* 13.

[1913 A. 947.]

Local Authority—Electric Supply—Power and Lighting—Similar Circumstances—Undue Preference—Electric Lighting Act, 1882 (45 & 46 *Vict. c.* 56), *ss.* 19, 20.

The Electric Lighting Act, 1882, provides by s. 19, "Where a supply of electricity is provided in any part of an area for private purposes, then except in so far as is otherwise provided by the terms of the license, order, or special Act authorising such supply, every company or person within that part of the area shall, on application, be entitled to a supply on the same terms on which any other company or person in such part of the area is entitled under similar circumstances to a corresponding supply"; and by s. 20, "The undertakers shall not, in making any agreements for a supply of electricity, show any undue preference to any local authority, company, or person, but, save as aforesaid, they may make such charges for the supply of electricity, as may be agreed upon, not exceeding the limits of price imposed by or in pursuance of the license, order, or special Act authorising them to supply electricity":—

Held, that the general language of these sections and their relation to each other being similar to those of the Railways Clauses Act, 1845, s. 90, and the Railway and Canal Traffic Act, 1854, s. 2, the present case was governed by the clear distinction to be found in the decisions on those sections between legitimate and illegitimate reasons for making a lower or preferential charge under legislation of this kind; and the governing distinction defined as follows:

A. must not be charged less than B. merely to overcome a greater reluctance on the part of A. to become a customer, or to induce A. to become a customer in respect of another supply, although either of these reasons might be a good commercial reason for charging less to A. were the public undertakers merely carrying on any ordinary commercial business. On the other hand, any circumstances which render it less costly or otherwise more profitable to supply A. than B. constitute a legitimate reason for making a lower charge to A. for the same supply. And if the Court once came to the conclusion that some such circumstances existed, then proof would not be required that the diminution in the charge was precisely equivalent to the diminution in the cost of the supply.

The defendants, who were the undertakers under the Long Eaton Electric Lighting Order, 1900, and with and under the powers and obligations imposed by that Order and the Electric Lighting Act, 1882, recently issued a circular with reference to the price charged for electricity to power consumers, the effect of which was in certain cases

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to make a lower charge for power purposes to consumer A., by whom electricity for the supply of both power and lighting was taken exclusively from the defendants, and a higher charge to consumer B., by whom electricity for the supply of power or of power and partial lighting only was taken:—

Held, applying the above principles to the facts of the case, that the differentiation created by the circular was a breach of both ss. 19 and 20 of the Electric Lighting Act, 1882—of s. 19 because the supply of electricity to consumer B. for power purposes was a supply corresponding with the supply to consumer A. for power purposes, and was applied for and given under similar circumstances; and of s. 20 because the lower charge to A. was an undue preference.

TRIAL OF ACTION WITH WITNESSES.

This was an action by the Attorney-General at the relation of the Long Eaton Gas Company for an injunction to restrain an alleged breach by the defendants of the provisions of ss. 19 and 20 of the Electric Lighting Act, 1882. The defendants were the undertakers under the Long Eaton Electric Lighting Order, 1900, having the powers and being subject to the obligations (within their area) given and imposed by that Order and the Electric Lighting Acts, 1882 and 1888. This area was, in whole or part, within the area within which the relators were empowered to supply gas under the Long Eaton Gas Act, 1901. The present proceedings arose out of the following circular issued by the council on or about September 25, 1911:—

"Dear Sir,—I am directed by my council to inform you that the following resolution has been adopted with reference to the price charged for electricity to power consumers, and which will take effect as stated therein:—Revision of Electricity Charges.—Committee having fully considered this matter, recommend that the present scale of charges remain in force where power and lighting are both taken exclusively from the council's electricity mains, but in cases where electricity supply is taken for power only, or for power and partial lighting, the lowest scale of charges where the number of units consumed during any quarter exceeds 4000 shall be 1*d.* per unit, and otherwise according to existing scale. Such amended charge to commence January 1, 1912."

At that date the scale of charges was—(1.) for lighting houses, shops, and other premises, except factories, a flat rate of 3½*d.* per unit, less 10 per cent. discount; (2.) for lighting factories,

3*d.* per unit for the first 2000 units per quarter, afterwards 2*d.* per unit, less in each case certain discounts increasing with the amount of the account; and (3.) for power or heating for a consumption not exceeding 250 units per quarter, 2*d.* per unit, and for larger consumptions per quarter a gradually decreasing charge per unit, until for a consumption between 4000 and 6000 units per quarter the rate was 1*d.* per unit, and for a consumption exceeding 6000 units per quarter the rate was $\frac{3}{4}d.$ per unit.

The effect of the change effected by the circular therefore was that where power and light were both taken exclusively from the defendants for a consumption exceeding 6000 units per quarter the rate was $\frac{3}{4}d.$ per unit, but where power or power and partial lighting only were so taken the rate for the same consumption was 1*d.* per unit. The relators alleged that the differentiation expressed in the circular was a breach of both ss. 19 and 20 of the Electric Lighting Act, 1882.

Romer, K.C., and *Percy F. Wheeler*, for the plaintiff. The plaintiff claims that the defendants are guilty of creating an undue preference in contravention of ss. 19 and 20 of the Electric Lighting Act, 1882. (1) The effect of the alteration will be that a factory taking no electric current for light or being partially lighted by gas will have to pay 1*d.* per unit for electric power, whereas when a factory takes power as well as all its light the charge for power will be $\frac{3}{4}d.$ per unit. The circumstances of factories taking power only and those taking power and light are similar circumstances within s. 19 of the Electric Lighting

(1) Electric Lighting Act, 1882:—

Sect. 19: "Where a supply of electricity is provided in any part of an area for private purposes, then except in so far as is otherwise provided by the terms of the license, order, or special Act authorising such supply, every company or person within that part of the area shall, on application, be entitled to a supply on the same terms on which any other company or person in such part of the area is entitled under similar circumstances to a corresponding supply."

Sect. 20: "The undertakers shall not, in making any agreements for a supply of electricity, show any undue preference to any local authority, company, or person, but, save as aforesaid, they may make such charges for the supply of electricity, as may be agreed upon, not exceeding the limits of price imposed by or in pursuance of the license, order, or special Act authorising them to supply electricity."

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Act, 1882, and the differentiation in price is an undue preference within s. 20 of that Act. The maximum demand for electricity is at night, and discrimination often is and can be properly made between day and night load. The object is to encourage the day load and to improve what is known as the "load factor," that is, the ratio of the actual supply to the maximum rate of demand if made continuously and without variation throughout every moment of the year. For instance in the present case factories get light at 3*d.* per unit as against private consumers who pay 3½*d.* This differentiation is justifiable since factories frequently use light during the day when the maximum load is not required. Another good ground for differentiation is between large and small consumers, the reason being that there is a difference in the cost to the electric supply company in supplying the current. The present proposal is on a different basis. Power costs no more to produce than light, and the reason can only be because the defendants want to obtain customers for light at the expense of the relators, i.e., competition with a rival trader. The mere fact that it will still be commercially profitable to the defendants to supply power at the lower rate is not enough to justify the differentiation. The defendants might perhaps say, We cannot afford to supply power at ¾*d.* unless you take light; then they must raise the price for all power. It is not justifiable to differentiate by raising the price for one purpose in order to get consumers to take energy for another purpose. There must be some difference in cost to the defendants. The differentiation in the present case does not depend upon the amount of current taken, since a consumer who takes partial lighting only is charged at the higher rate for power although he may actually consume more current for light than a consumer who takes his entire light from the defendants and who would therefore pay the lower rate for power. The present case is distinguishable from the case of *Metropolitan Electric Supply Co.* v. *Ginder* (1) because the differentiation in that case was one which would have the effect of reducing the cost or making it more profitable to the company affording the supply; and also from *Attorney-General for Victoria* v.

(1) [1901] 2 Ch. 799.

Melbourne Corporation (1) because in that case every customer was free to adopt either system of charge. The real object in this case is to induce customers to light with electricity who are not already doing so, and this upon the analogy of the railway cases is not justifiable. The provisions of the Railways Clauses Consolidation Act, 1845 (2), s. 90 of which provides for the same charges being made under similar circumstances, and of the Railway and Canal Traffic Act, 1854 (2), s. 2 of which prohibits an undue preference, are similar in their terms to ss. 19 and 20 of the Electric Lighting Act, 1882, and the cases decided under those sections form useful analogies in the consideration of the present case. Those particularly in point are *London and North Western Ry. Co.* v. *Evershed* (3); *Phipps* v. *London and North Western Ry. Co.* (4); *Denaby Main Colliery Co.* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (5); *Bellsdyke Coal Co.* v. *North British Ry. Co.* (6); *Diphwys Casson Slate Co.* v. *Festiniog Ry. Co.* (7); *Baxendale* v. *Great Western Ry. Co.* (8); *Dublin and Manchester Steamship Co.* v. *London and North Western Ry. Co.* (9) These cases establish that when the differentiation reduces the cost to the company rendering the service circumstances are different, but that when the object of the differentiation is merely to develop trade or to enable the company ultimately to make additional profit the circumstances are not dissimilar.

Martelli, K.C., Courthope-Munroe, and *W. W. Morgan,* for the defendants. It is a common practice to make a difference in the charge where power only is taken and where power and light are taken. The only question here is whether there is an undue preference within the meaning of ss. 19 and 20 of the Electric Lighting Act, 1882. The railway cases, although useful, must be carefully distinguished. Here there are three questions: (i.) Under s. 19 do customers for power get a supply under similar circumstances as customers for light, eliminating for a moment the question of partial lighting? (ii.) Do customers

(1) [1907] A. C. 469.
(2) See note on p. 269, post.
(3) (1878) 3 App. Cas. 1029.
(4) [1892] 2 Q. B. 229.
(5) (1885) 11 App. Cas. 97.
(6) (1875) 2 Ry. & Ca. Tr. Cas. 105.
(7) (1874) 2 Ry. & Ca. Tr. Cas. 73.
(8) (1858) 5 C. B. (N.S.) 309; 28 L. J. (C.P.) 69.
(9) [1914] 2 K. B. 192.

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who use power and light get a corresponding supply to customers who use power only? (iii.) Is there an undue preference within s. 20? Under normal conditions the factories work for a twenty hours day from 4 A.M. to 12 midnight; in slack times they work at day and not at night, from 7 A.M. to 7 P.M. Twenty-five per cent. of the machinery employed is winding machinery, and this must cease at 7 P.M. under the Factory Acts. So that from 7 P.M. to midnight a large part of the machinery is unemployed if power only is taken. If light is taken as well as power this machinery can be used for generating current for lighting purposes, which improves the load factor and makes the supply more profitable to the defendants. With two exceptions the present scale gives a cheaper supply to customers with the best load factor. *Metropolitan Electric Supply Co.* v. *Ginder* (1) and *Attorney-General for Victoria* v. *Melbourne Corporation* (2) are authorities in favour of the defendants' contention. *Husey* v. *London Electric Supply Corporation* (3) supports *Metropolitan Electric Supply Co.* v. *Ginder*. (1) With regard to partial lighting it is true that a consumer who takes practically his entire light from the defendants would have the benefit of the reduced charges for power, but the provisions of the circular are to enable the defendants to make the higher charge for power where only a nominal amount of light, as for instance a single lamp, is taken. It is not a true view to consider a consumer who takes power and light as a person taking two supplies and to say qua power his circumstances are similar to the circumstances of a consumer taking power only. Power and light are not two separate supplies, they are one supply. [They referred to *Foreman* v. *Great Eastern Ry. Co.* (4); *Abram Coal Co.* v. *Great Central Ry. Co.* (5); *Hickleton Main Colliery Co.* v. *Hull, Barnsley, and West Riding Junction Ry. Co.* (6)] If it can be shewn that a differentiation will reduce the cost to the defendants of affording the supply, the differentiation is justified, and it need not be shewn that the one accurately counterbalances

(1) [1901] 2 Ch. 799.
(2) [1907] A. C. 469.
(3) [1902] 1 Ch. 411.
(4) (1875) 2 Ry. & Ca. Tr. Cas. 202.
(5) (1905) 12 Ry. & Ca. Tr. Cas. 125.
(6) (1903) 12 Ry. & Ca. Tr. Cas. 63.

the other. Individual cases of hardship will not vitiate the general scheme.

Romer, K.C., in reply.

Cur. adv. vult.

May 13. SARGANT J. delivered the following written judgment:— In this action the Attorney-General on the relation of the Long Eaton Gas Company is seeking to restrain an alleged breach by the Long Eaton Urban District Council of the provisions of ss. 19 and 20 of the Electric Lighting Act, 1882.

The defendants, the Long Eaton Urban District Council, are the "undertakers" under the Long Eaton Electric Lighting Order, 1900, and in that capacity have the powers and are subject to the obligations (within their area) which are given and imposed by that Order and the Electric Lighting Acts, 1882 and 1888. This area is, in whole or part, within the area within which the relators are empowered to supply gas under the Long Eaton Gas Act, 1901, and the alleged breach by the council of their statutory obligations is undoubtedly one which might, and probably would, result in damage to the relators. With this aspect of the matter, however, I am not concerned, though no doubt it furnishes the motive for the institution of these proceedings. The Attorney-General is the plaintiff, and is entitled to complain of any breach of statutory obligations of this kind without any proof of actual or apprehended damage: *Attorney-General* v. *London and North Western Ry. Co.* (1)

The area of supply of the council is situate in a manufacturing district the staple industry in which is the production of machine-made or Nottingham laces; and the electric energy supplied by the council is used not only for public and private lighting but also for supplying motive power to drive the various machines employed in that industry. Indeed, it is for this latter purpose that the main part of the energy sold is employed. No precise figures in this respect were furnished to me, though no doubt they are readily obtainable. But it appears that in the year 1913, while the total number of Board of Trade units sold to private consumers by meter was 1,363,181,

(1) [1900] 1 Q. B. 78.

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and the total number sold to those consumers and for public lighting was 1,499,345, there were sold for power alone to the fifteen consumers of energy in the district, who took over 6000 units per quarter each, an aggregate of 966,036 units, which is over 70 per cent. of the former figure and between 64 and 65 per cent. of the latter figure. It would probably be within the mark to say that at least three-fourths of the total number of units supplied are supplied for power. The electrical undertaking of the council is a comparatively small one. On the basis of the statutory accounts for the year 1913 the total rate of demand for electrical energy that could be made at any one time by means of the simultaneous user of all the connections made is equivalent to that required for 59,152 eight candle power lamps, or at 30 watts per lamp to 1774 kilowatts. The total capacity of the station is 950 kilowatts. The maximum rate of demand actually made at any one time during 1913 was 658 kilowatts, and of this maximum rate of demand about 308 kilowatts was made for power, leaving about 350 kilowatts as the maximum rate of demand for light. If this maximum rate of demand had been made continuously, and without variation, throughout every moment of the year the actual number of units supplied or consumed during the year would have been 5,764,080 units, instead of the actual supply of 1,499,345 units. And the ratio of the latter figure to the former, expressed as a percentage, which is what is called in electrical engineering "the load factor," is accordingly some 26·01, which is admittedly an exceptionally favourable figure.

This excellent load factor is no doubt due not only to the large proportion of the electric supply which is taken for power—the demand for which is usually longer and is more even throughout the year than that for light—but to the exceptionally long hours for which the mills in the Long Eaton district are worked. It appears from the evidence that the normal hours for which the main part of the machinery, namely, that used by the male operators, is worked are from 4 A.M. to 12 midnight, and, though in slack times mills may work only twelve hours per diem, or even be closed altogether, on the other hand, in busy times there is a

continuous working of the mills throughout the whole twenty-four hours. As regards some part of the machinery, namely, the winding machinery, which is run by female labour, the Factory Acts prevent night work. But even in the case of this machinery, which I estimate on the evidence as not using more than 20, or at the most 25, per cent. of the total power load, the normal working is for twelve hours a day, namely, from 6.30 or 7 A.M. to 6.30 or 7 P.M.

It will also be noticed that, though at least three-fourths of the units supplied were supplied for power, the installation at the defendants' power station necessary for the supply of those units was actually less than that required for the supply of the units for light, since as I have said the maximum demand at any one time in the year 1913 was at the rate of 308 kilowatts for power and at the larger rate of 350 kilowatts for light.

It should be added that throughout the council's area gas is in active competition with electric energy both for supplying light and for supplying motive power. Some works use electric energy for both purposes and others use gas for both purposes. Some use electricity for power and gas for lighting; and others use gas for power and electricity for lighting. Steam is but little used, especially in the more modern shed factories which appear to be superseding those built with more than one storey.

The undertaking of the council has been a successful one, and it has been possible not only to earn profits but to lower the rates charged for the supply of electric energy. There was a reduction in these rates as from March 31, 1905, and again as from April 1, 1910. Since the last date, and subject only as from June 1, 1912, to the change complained of in this action, the rates charged have been those shewn in a printed scale marked "WER. 1." Under this scale the most important rates of charge are for the purposes of this action: (1.) For lighting houses, shops, and other premises, except factories, a flat rate of $3\frac{1}{2}d.$ per unit, less 10 per cent. discount; (2.) for lighting factories, $3d.$ per unit for the first 2000 units per quarter, afterwards $2d.$ per unit, less in each case certain discounts increasing with the amount of the account; and (3.) for power or heating, for a

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consumption not exceeding 250 units per quarter, 2*d.* per unit, and for larger consumptions per quarter a gradually decreasing charge per unit, until for a consumption between 4000 and 6000 units per quarter the rate is 1*d.* per unit, and for a consumption exceeding 6000 units per quarter the rate is $\frac{3}{4}d.$ per unit. I need hardly add, and it is a matter of some importance here, that the difference in the rates of charge for lighting and power respectively involves this, namely, that if a consumer desires a supply for power as well as a supply for light he must have a separate circuit on his premises for the supply of each purpose, each circuit being separately connected with the mains, and having a separate meter at its terminals. Each such circuit is as separate, electrically speaking, from the other as if it furnished a separate supply to a different consumer; and the consumer who has the two circuits can use the maximum supply of electricity through each circuit simultaneously.

Down to this point no criticism is suggested of the council's charges. What has given rise to the present proceedings is a circular issued by the council on or about September 25, 1911, and which is couched in the following terms, namely: [His Lordship read the circular and continued.]

It is alleged that the differentiation expressed in this circular between those large consumers of power who take power and lighting exclusively from the council's mains and those large consumers of power who take for power only or for power and only partial lighting is a breach of ss. 19 and 20 of the Electric Lighting Act, 1882; and it is sought to restrain this differentiation by the injunction of this Court.

The matter has in fact been argued before me entirely on the differentiation between a consumer A. who takes power exclusively and light exclusively from the defendants and a consumer B. who takes power exclusively from the defendants and takes either no light or only some of his light from the defendants. No comparison has been made between A. and a consumer C. who takes power to the 6000 units per quarter limit and the whole of his lighting from the defendants, but also takes some power from another source; and it may be that, whatever the intention of this circular, C., though not coming within the definition of a

person taking power and lighting exclusively from the council, is nevertheless not within the subsequent definition of those persons whose rates of charge are increased by the circular, and accordingly is left untouched by it. I merely mention this to prevent its being supposed that the point has been overlooked, and for the purpose of remarking that, if C. were proposed to be brought within the scope of the circular, his case against differentiation would appear to be clearer than the case of B. However, the proposed differentiation between consumers of the same class as A. on the one hand and consumers of the same class as B. on the other hand is no doubt the practical one; and it is to this differentiation that I propose to confine myself.

Sects. 19 and 20 of the Electric Lighting Act, 1882, are in the following terms: [His Lordship read the sections and continued.] It is said by the plaintiff that both sections of the Act are infringed—s. 19 because the supply of electricity to B. for power purposes is a supply corresponding with the supply to A. for power purposes and is applied for and given under similar circumstances, s. 20 because the lower charge to A. is an undue preference. It is said by the defendants, as regards s. 19, first, that the supply to A. for power and exclusive light is not a supply corresponding with a supply to B. for power only, or for power and partial lighting; and secondly, that even if the supply to A. for power has to be considered separately and so "corresponds" with that to B., still the circumstances are not similar in the two cases. As regards s. 20, the defendants say that there is sufficient dissimilarity in the conditions of supply between the two cases to prevent the difference of charge, though perhaps preferential, from amounting to an undue preference.

The first defence as regards s. 19 seems to me a question of construction and I will deal with that defence first. As already pointed out, any supply of electricity for power is in the ordinary course taken quite separately from any supply for lighting, namely, by a separate circuit connected with the mains by separate terminals and with a separate meter. And this being so, I think that according to any ordinary use of

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words the council must be said to be offering not a single supply of electricity but an alternative supply, and that any consumer taking for power and light in the ordinary way on separate circuits would be said to be taking not a single supply but two supplies, namely, a supply for power and a supply for light. And I can see no sufficient reason for cutting down the beneficial operation of s. 19 so as to prevent its application to each such separate supply. In my judgment the hypothetical consumer B., though taking a supply for power only, is taking a supply corresponding with the like supply of energy to A. for power purposes, although A. may also be taking an additional separate supply for light. And if any differentiation is allowed between them qua their respective supplies for power it must be on the ground that the circumstances are not similar in the two cases.

The second defence as regards s. 19 and the defence as regards s. 20 seem to me to be very much the same and to differ, if at all, only in degree. Under each section I think that the whole circumstances may be considered from the broadest possible point of view, and that one question is whether the circumstances affecting consumer A. and consumer B. in relation to their supply of power are substantially dissimilar or sufficiently dissimilar to justify broadly the differentiation proposed by the circular.

The general language of the two sections and their relations to each other are curiously similar to those of s. 90 of the Railways Clauses Act, 1845, and s. 2 of the Railway and Canal Traffic Act, 1854. And some of the decisions under those Acts as well as one or two decisions under the Act now in question or equivalent legislation in the Colony (now State) of Victoria are in point here.

The most important and apposite of the railway cases that have been cited to me are *London and North Western Ry. Co.* v. *Evershed* (1), *Denaby Main Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (2), *Baxendale* v. *Great Western Ry. Co.* (3), and *Phipps* v. *London and North Western*

(1) 3 App. Cas. 1029.
(2) 11 App. Cas. 97.
(3) 5 C. B. (N.S.) 309; 28 L. J. (C.P.) 69.

Ry. Co. (1) From these cases and those of *Metropolitan Electric Supply Co.* v. *Ginder* (2) and *Attorney-General for Victoria* v. *Melbourne Corporation* (3) I think a fairly clear distinction may be drawn for the present purpose between those reasons for making a lower or preferential charge which under legislation of this kind are legitimate and those which are illegitimate. It would seem that A. must not be charged less than B. merely to overcome a greater reluctance on the part of A. to become a customer, or to induce A. to become a customer in respect of another supply, although either of these reasons might be a good commercial reason for charging less to A. were the public undertakers merely carrying on any ordinary commercial business. On the other hand, any circumstances which render it less costly or otherwise more profitable to supply A. than B. constitute a legitimate reason for making a lower charge to A. for the same supply. And if the Court once came to the conclusion that some such circumstances existed, then proof would not be required that the diminution in the charge was precisely equivalent to the diminution in the cost of the supply.

To apply these principles to the present case, if as alleged by the relators the object and result of the circular were to cause or induce those who took power only or power and partial lighting to take the whole of their lighting from the council, and the extra custom thus obtained would not per se make the rendering of the existing service less costly or more profitable to the council, then the policy of the circular would be wrong, and the differentiation between A. and B. would be illegal. But if, on the other hand, the combination of lighting or exclusive lighting would make the supply of power or of power and partial lighting to the customer in question less costly or more profitable, then there would be a justification for reducing the charge to A. as compared with B. or (to follow the precise lines of the circular) for increasing the charge to B. as compared with the charge to A.

As I understand the argument this view of the law was accepted on both sides and the contest between the parties

(1) [1892] 2 Q. B. 229. (2) [1901] 2 Ch. 799.
(3) [1907] A. C. 469.

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really resolved itself into one of fact, namely, whether as between customer A., who takes power exclusively and light exclusively from the council, and customer B., who takes power exclusively from the council, but either no light or only part of his light, the taking by A. of an exclusive supply of light renders it cheaper or more profitable to the council to give a supply of power to him than to B. The onus of establishing this would appear to rest on the council. Speaking generally, the technical and other evidence by which they sought to prove their case seemed to me extremely thin. On the other hand no technical evidence at all was called by the plaintiff. In this state of things I must do the best I can on the materials before me. But should the same sort of question ever be fought out again with reference to a larger undertaking there would be room for very much fuller and more complete technical evidence on both sides. One thing seems fairly clear from the evidence of Mr. William Johnson, namely, that before making the change the council did not seek technical advice, and that in making it they were not acting on any reasoned or effective comparison of the cost of supplying the typical consumer A. with power as compared with the cost of supplying the typical consumer B. with power. Nor would it, I think, be doing the council an injustice to say that the change was made merely on a rough general view of commercial inducement to the consumer and commercial advantage to the council in which no distinction was made between, on the one hand, coaxing or inducing customers to increase their custom by taking a second supply, and, on the other hand, lowering a charge to a customer for an existing supply in return for his lowering the cost of that supply by taking a supply of a different kind. They obviously had little if any idea as to what was or was not prohibited in this respect by their statutory obligations. Mr. Snell, the council's expert, of course was better informed. But even he, as will be seen, fell into some mistake on this point; and he was apparently only called in long after the change and for the purpose of giving evidence in this action, and justifying the change ex post facto. If, therefore, the council have a good and sustainable reason for giving lower terms for power to customer A. than to

customer B., this would seem to be due rather to good fortune than to good judgment. The only evidence in justification of the preference to customer A. that has to be seriously considered is that of Mr. Snell, and a good deal of that evidence may be dealt with very briefly. At the end of his examination in chief he relied on the extra business thus secured in supplying energy for lighting; but this is an inadmissible reason. In another part of his evidence he pointed to the progressive improvement in the load factor of the undertaking down to the present time; but this had been taking place quite as much prior to the change as subsequently to it. And he also referred to the figures in relation to the supply of various particular consumers, as to which I will say a few words a little later, but which when examined certainly do not seem to help his case. All this seems to me of little if any value. The only part of Mr. Snell's evidence which struck me as really relevant or important was that in which he attempted to shew that under the special conditions of Long Eaton the supply of energy for lighting factories is in a sense supplementary to the supply of energy for power and improves the load factor of the undertaking by providing a demand for the machinery at the defendants' power station at a time when it would otherwise be idle.

Mr. Snell, of course, had to acknowledge that as the load factor for light is much worse than that for power a customer for both power and light has in general a worse load factor than a customer for power only. For inasmuch as he takes his maximum load for light from time to time concurrently with his maximum load for power his total load factor is a mean between the worse load factor for light and the better load factor for power, though the lower load factor for light may, and should if the relative prices for light and power are fair, be compensated for by the higher price per unit charged for light. But he said that inasmuch as at Long Eaton some 20 per cent. of the power load, namely, that attributable to the winding machinery, is not working before 7 A.M. or after 7 P.M., the factory owner who takes light as well as power gives during the summer (by which I mean the lighter) months of the year an opportunity to that portion of the machinery at the central station which

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may be regarded as installed against the winding-machine load of being used for the production of light during the whole or some of the hours between 7 P.M. and midnight, and the whole or some of the hours between 4 A.M. and daylight, or in times of great activity between midnight and daylight. And the result, said Mr. Snell, was that the load factor of such a consumer—consumer A.—was improved, and that he was in truth a better customer—a customer who could be supplied more cheaply—than customer B.

This would no doubt be quite true if no more machinery had to be installed to supply customer A. than customer B., or if, which is much the same thing, load factor could properly be calculated with reference to the maximum demand or load during the summer months of the year, and not with reference to the maximum load throughout the whole of the year. But in fact the contrary is the case. The demand for electric lighting is of course a demand that varies seasonally, and the demand or load which really matters, and against which power has to be installed, is that during the winter or dark months, as indeed is indicated in the calculation of load factor in the council's accounts on the usual annual basis. Further there is nothing whatever to prevent the period of the maximum or peak load for lighting being coincident with the maximum or peak load for power; and indeed, so far as the factories alone are concerned, there is a good deal to make the two synchronize. And accordingly it is quite clear that the typical consumer A. when compared with the typical consumer B. must be considered as necessitating the installation in the central station not merely of machinery sufficient to satisfy his demand for power, but also of extra machinery to satisfy his demand for light, and so as increasing to that extent the denominator of the fraction representing his load factor before its conversion into a percentage.

If this be so, it is difficult to see on what principle the machinery used to supply power to the winding machinery run by female labour can be considered as being profitably employed in supplying light to those parts of the factory which are run by male labour. For, ex hypothesi, other machinery has had

already to be installed for the purpose of supplying light not merely to the principal part of the factory where the male labour goes on working, but also to that portion of the factory where female labour is employed, and where the supply of light is not required for any longer hours than the supply of power.

When this difficulty was put to Mr. Snell, the only answer that he could give to it was that during the summer months the plant was overhauled, and that one by one the units at the central station were dismantled. But I cannot think that this explanation was at all adequate or satisfactory, having regard to the capacity of the station, namely, 950 kilowatts, and having regard also to the marked difference (as shewn by the summer and winter curves put in) of a maximum daily winter load of some 658 kilowatts and a maximum daily summer load of some 308 kilowatts. This seasonal difference alone must obviously give ample opportunity for overhaul and for dismantling more than one unit at a time, unless the units are of a size altogether disproportionate to the output of the station, and indeed are only two in number. And in the absence of anything like definite information on this point either from Mr. Snell or from the engineer of the council I cannot look on this supposed advantage with regard to overhaul as any real justification of the differentiation between consumer A. and consumer B.

It seems to me that, large user being already allowed for in the condition that 6000 units are to be consumed per quarter, and there being no certainty that consumer A. does in fact consume more altogether than consumer B., whose bill for power alone may largely exceed that for the power and light consumed by A., no real reason has been shewn for regarding A. as a more profitable customer than B. A.'s load factor, calculating it in the ordinary and proper way over the year and not over a portion of it, is worse than B.'s, and worse substantially in proportion to the amount of light he takes, as indeed it should be having regard to the fact that he pays more per unit for light. And the taking of two supplies by A. does not involve any diversity factor in A.'s demand if I rightly apprehend the sense in which Mr. Snell used that term. For A.'s peak time for power and peak time for load may be and often are concurrent, the whole

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factory of course requiring to be lighted, for instance, at 6 P.M. during the winter months when the demand for power is in full force.

Though I have defined B. as a customer who either takes for power only or who takes for power and partial lighting I have hitherto considered him in the light of the first alternative, namely, as taking for power only. But if he is now considered as taking for power and for partial lighting, any differentiation between him and A. and the preference shewn to A. are even less defensible. He may well be taking more for power than A. and more for light than A. and may be taking them in the same relative proportions as A. And yet if he takes any light at all from any other source he is to be denied the allowance of 25 per cent. made to A. This is not in my judgment a mere isolated or exceptional case of hardship such as might be found under any scale increasing by definite steps, but an example of a class of cases likely to occur and specially aimed at by the circular. It seems to me impossible to justify such a differentiation as this. And the express making of the differentiation is a very strong indication that the reason for making it was not the relative cheapness of supplying A., but the desire to oust competition in supplying light.

The only other matter I need refer to is a table called Appendix A which was put in by the council for the purpose of shewing the average price paid by the fifteen consumers who fall within the same class as the hypothetical consumer A. So far as it goes, that table seems to me to tell strongly against the council. On the two scales adopted by the council each of no less than seven of these consumers pays less to the council for power and lighting together than he would do if he took the same amount of power alone. And the whole number of these consumers, who together take very much more than half the total units supplied by the council, only pay 34*l.* 5*s.* 2*d.* extra for the 81,098 units supplied to them for lighting purposes. Now, not only are those units nearly one-tenth of the units taken for power, for which 2799*l.* 18*s.* 4*d.* is paid, but having regard to the difference in load factor between light and power they must require an installation of probably

about one-third of the machinery which is required for the power units taken by these consumers. And accordingly, if 1*d.* per unit is a proper sum for a supply of power, and 3*d.* per unit is a proper sum for a supply of light, it is obvious that the supply of light to these consumers causes the council an extraordinary loss.

The footnote to the table in the following terms, namely, "Thus to acquire 9·16 per cent. more business the company reduce the price 6½ per cent.," may throw some light on the object with which the reduction is proposed to be made as between A. and B. But the comparison made by it is obviously wrong. For it assumes that, but for the reduction, the 81,098 units of light as well as the 884,938 units of power would have been taken and would have been charged for at 1*d.* Further, the reduction is of course not 6½ per cent. at all, but 25 per cent., namely, from 1*d.* to ¾*d.* And the commercial effect is that 81,098 units of light which ordinarily would at 3*d.* per unit cost 1013*l.* 14*s.* are in fact supplied for 34*l.* 5*s.* 2*d.*

In the result I come to the conclusion that there is a breach of both sections; of s. 19 because B. is asking for a supply of power corresponding with that demanded by A. and under similar circumstances; of s. 20 because an undue preference is proposed by the circular to be given to A. as compared with B.

The plaintiff is in my judgment entitled to a declaration that the differentiation proposed by the circular of September 25, 1911, between these consumers of over 6000 units per quarter for power who do and those who do not take their lighting exclusively from the council is in contravention of ss. 19 and 20 of the Electric Lighting Act, 1882. Then there will be liberty to apply for an injunction if necessary. If the defendants determine to appeal no such application will be made while the appeal is pending. The defendants must pay the costs of the action.

Solicitors: *R. W. Cooper & Sons, for Fraser & Son, Nottingham; Lees & Co., for E. Williams, Long Eaton.*

NOTE.—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 90: "And whereas it is expedient that the company should be enabled to vary

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the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties: it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special Act contained, from time to time to alter or vary the tolls by the special Act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit; provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway."

Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2: "Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway company and canal company and railway and canal company having or working railways or canals which form part of a continuous line of railway or canal or railway and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf."

A. C.

In re FAMATINA DEVELOPMENT CORPORATION, LIMITED.

[00431 of 1912.]

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April 7, 8.
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July 20, 21.

Company—Indemnity to Servants—Special Article—Common Law Right—Mining Engineer—Scope of Employment—Libel and Slander—Costs of successfully defending Action.

The company was registered in 1902 for the purpose of acquiring from one of the promoters, who became the chairman and managing director of the company, certain mining properties and options in the Argentine. The applicant was employed under a contract in writing by the company as consulting engineer to visit the Argentine and to make inquiries into the value of these properties and options and report thereon to the company. As the result of his inquiries the applicant reported that the managing director had made contracts for worthless properties, had made misleading reports, and had arranged for certain secret commissions. The managing director brought an action for libel and slander against the applicant, which after being carried to the House of Lords was ultimately dismissed with costs owing to the failure of the managing director to comply with an order for security for the costs of a new trial. The greater part of the applicant's costs proved irrecoverable, and he now sought to prove in the liquidation of the company for the amount of these costs. The liquidator rejected the proof. The applicant was a member of the company at the date of his employment, and article 143 of the company's articles of association provided that every officer or servant of the company should be indemnified by the company against loss, and that it should be the duty of the directors out of the funds of the company to pay all costs, losses, and expenses which he might incur by reason of any act done by him as such officer or servant:—

Held, by Sargant J., that on the evidence the reports in question were privileged and were made without malice, but, though it was the duty of the applicant to make the reports to the company, it did not fall within the direct terms of his employment so to do; and that the applicant was not entitled to any indemnity against the costs in question either under article 143, which constituted no contract between the company and the applicant, or under the common law.

The James Seddon (1866) L. R. 1 A. & E. 62 distinguished.

Held, by the Court of Appeal, that in fact everything the applicant had done was in pursuance of his duties as agent, and under the settled rules of agency he was entitled to indemnity and reimbursement.

Decision of Sargant J. reversed.

Adjourned Summons.

The following statement of facts is taken from the judgment of Sargant J.: "In this case the applicant, Mr. Florence O'Driscoll,

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is applying for an order that a decision of the liquidator of the Famatina Development Corporation rejecting a proof tendered by him may be reversed and that his proof may be allowed. The proof is in respect of a large sum of costs which, I must take it, Mr. O'Driscoll has incurred and which Mr. Hermann Pape, a German subject, has been ordered to pay, which costs, however, are irrecoverable because Mr. Pape is not resident in this country. The application is a sort of aftermath of very heavy litigation which took place some time ago between Mr. Pape and Mr. O'Driscoll in a libel and slander action. I will state as shortly as I can the circumstances under which that litigation originated. The Famatina Development Corporation was registered on January 21, 1903. Mr. Pape was a promoter of the company, and the main object of the company was to acquire from Mr. Pape a large number of mining and other options in the Argentine.

"By an agreement dated June 5, 1903, made between the company of the one part and Mr. Pape of the other part, Mr. Pape was appointed managing director of the company for one year at a salary of 2000*l.* a year and upon the terms that at the expiration of that time he was to enter into another agreement with the company to be their managing director for three years at an increased salary of some 6000*l.* a year together with certain additional remuneration. He was also at all material times the chairman of the board of directors of the company.

"By an agreement dated May 12, 1903, made between the company of the one part and Mr. O'Driscoll of the other part, Mr. O'Driscoll was appointed consulting engineer to the company for the period of one year from January 1, 1903, and it was thereby provided that he was to make at least one visit to the Argentine, where he was to inspect the properties of the company; and by clause 5 it was provided that the company should invest him with all necessary authority to enable him to conduct the business of the company, and that in addition to an annual salary of 1500*l.* the company should pay all out of pocket expenses incurred by him while conducting or assisting to conduct the business of the company in England and all travelling, living, and other expenses incurred on the business of the company

during the visit to the Argentine. By clause 8 of the agreement Mr. O'Driscoll was from time to time, as he might be directed by the company, to send in written reports as to the mines and was to use his best endeavours to promote the interests of the company and was at all times to refrain from divulging the affairs of the company.

"It appears that just before he went out to the Argentine some question had arisen with reference to certain secret commissions which Mr. Pape was said to have taken, and on June 11, 1903, after that question had at any rate been mooted, a letter was given to Mr. O'Driscoll by way of supplement to his instructions under the agreement, and in that letter the important paragraph is this: 'It is emphatically the desire of the board that you should be perfectly free to make any inquiries that you think fit in the interests of the company, and, as previously stated, they were advised that the power of attorney herewith gives you full authority so to act.' The power of attorney is not before me, but I understand that there is nothing very vital in that.

"After Mr. O'Driscoll had been some little time in the Argentine he alleged that he had discovered certain facts which are summarized before me as follows, namely, that Mr. Pape had made contracts for worthless properties, had made misleading reports, and had arranged for certain secret commissions. On September 21, 1903, Mr. O'Driscoll sent a cablegram to the company foreshadowing what his report was going to be, and on October 1, 1903, he sent a formal report. That report was couched in extremely strong language and, as it seems to me, quite unnecessarily strong language; but no doubt, if he wished to set out adequately what he had discovered or thought he had discovered, it would have been difficult if not impossible to do so in any terms which would not have exposed him to an action for libel. Board meetings were subsequently held on November 30 and December 1, Mr. Pape and Mr. O'Driscoll being present at each meeting. Mr. O'Driscoll repeated or added to his allegations, and he was then asked to put what he had said into writing, and on December 9, 1903, he made a further written statement. The result was that on December 17 Mr. Pape was

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requested to resign his position as chairman and managing director of the company pending the bringing by him of an action for libel and slander for the purpose of clearing his character, and it was indicated to him, as I understand the facts which appear in a letter of the same date, December 17, 1903, written by him to the board, that if he did not resign, he would be forcibly retired from the position he held in the company. The immediate consequence of the reports and the statement was that on December 19, 1903, Mr. Pape issued a writ in an action for libel and slander against Mr. O'Driscoll. The statement of claim was delivered in February of the following year, and in May the defence was delivered pleading justification and privilege. The action extended over a considerable time—I am told that there were two most expensive commissions to the Argentine—and it ultimately came to be tried before Phillimore J. and a special jury in January, 1909, and on January 28, 1909, a verdict was given to the effect, first, that the statements were not true, and secondly, that there was malice on the part of Mr. O'Driscoll, and the damages were assessed at 3000*l.* Mr. O'Driscoll appealed to the Court of Appeal, and on May 27, 1909, the appeal was allowed and a new trial was ordered by a majority of the Court of Appeal consisting of Fletcher Moulton and Farwell L.JJ. (Lord Alverstone C.J. dissenting); and some very strong language was used by the majority of the Court of Appeal with reference to the conduct of Mr. Pape. From that judgment Mr. Pape appealed to the House of Lords, who on July 26, 1912, dismissed the appeal, so that in the result the order for a new trial stood; but in the House of Lords the strong language was expressed mainly against Mr. O'Driscoll, and it is rather difficult to see why a new trial was ordered in the view that was there taken, but at the end of Lord Atkinson's speech a great deal of stress was laid upon this, that the story was so complicated and so involved that no one could reasonably expect that any judge or jury could ascertain it at the first time of asking, and it was only after it had been before two Courts of Appeal that the issues had been sufficiently defined to render it possible for the action to be properly tried. That might have been the result if funds had lasted out. An application was

made by Mr. O'Driscoll that security for the costs of the new trial should be given by Mr. Pape, he being resident abroad. The security was ordered, but was not provided, and on March 13, 1913, the usual order was made for the dismissal of the action if the security was not given. Security was not given and the action was dismissed with costs. Mr. O'Driscoll has received so much of the costs of the action and of the appeals as could be provided out of the security for costs given by Mr. Pape during the various stages in the action, but there still remains a very large amount of costs, amounting to between 6000*l.* and 7000*l.*, of which he has not obtained payment from Mr. Pape.

"The company is now in course of liquidation, and this is an application by Mr. O'Driscoll in the winding up of the company that he may be indemnified by the company out of its assets for the costs which he has incurred in the course of these proceedings as being costs or expenses to which he had been put in the course of his employment as a servant of the company."

The applicant was a member of the company at the date of his employment, and article 143 of the articles of association of the company provided: "Every director, trustee, auditor, solicitor, manager, secretary, and other officer and servant of the company shall be indemnified by the company against loss, and it shall be the duty of the directors, out of the funds of the company, to pay all damages, fines, costs, losses, and expenses, which any such officer or servant may incur or become liable to by reason of any contract entered into, or act or deed done by him as such officer or servant or by reason of any act of any of the officers, servants or employees of the company."

The summons was heard before Sargant J. on April 7 and 8, 1914.

Hon. Frank Russell, K.C., and *Douglas Hogg*, for the applicant. The applicant is entitled to the indemnity provided by article 143, as a servant, if not an officer, of the company; but apart from article 143 it is a general principle of the common law that a servant doing an act in the course of his duty is entitled to be indemnified by his employer against the consequences. The principle is clearly stated in *The James Seddon* (1), where

(1) L. R. 1 A. & E. 62.

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Dr. Lushington held that the master of a ship was entitled to the expenses incurred by him in defending an unfounded charge of murder originating directly from the performance of his duty to the owners in chastising some of the crew.

The implied indemnity covers solicitor and client and not merely party and party costs: *Williams* v. *Lister & Co.* (1)

Gore-Browne, *K.C.*, and *E. W. Hansell*, for the liquidator. First, article 143 does not constitute a contract between the company and the applicant: *Eley* v. *Positive Assurance Co.* (2); *Browne* v. *La Trinidad* (3); nor can it be treated as evidence of the terms of the employment having regard to the express contract entered into by the agreement of May 12, 1903: *Boston Deep Sea Fishing and Ice Co.* v. *Ansell.* (4)

Secondly, the applicant has no right of indemnity from the company in respect of these costs under any contract implied by the common law. The claim is really one for insurance, and this is not sustainable under the common law; otherwise there would have been no occasion for such Acts of Parliament as the Employers' Liability and Workmen's Compensation Acts. *The James Seddon* (5) is distinguishable. The proceedings there were for wages and disbursements, and Dr. Lushington held that in defending the case the master was really defending it on behalf of the owners. In the present case the applicant was defending the action on his own account alone and he was not employed by the company to make the reports which gave rise to the proceedings. *Studdert* v. *Grosvenor* (6) shews that there is no right of indemnity in such a case. Moreover, assuming the occasion to be privileged, the applicant has not proved the absence of malice on his part, and it is a settled rule that there can be no indemnity in respect of a servant's tortious acts. [They also referred to *Pullman* v. *Hill & Co.* (7)]

Douglas Hogg in reply. First, it is admitted that article 143 does not constitute a contract between the applicant and the company, but the applicant was a shareholder, and if a share-

(1) [1913] W. N. 295.
(2) (1875, 1876) 1 Ex. D. 20, 88.
(3) (1887) 37 Ch. D. 1.
(4) (1888) 39 Ch. D. 339, 366, per Bowen L.J.
(5) L. R. 1 A. & E. 62.
(6) (1886) 33 Ch. D. 528.
(7) [1891] 1 Q. B. 524.

holder contracts with the company to take a certain post and the articles provide for certain consequences to follow therefrom the articles are evidence of the terms of the service: Buckley on the Companies Acts, 9th ed. p. 50; *In re Brazilian Rubber Plantations and Estates.* (1) There is nothing in the express contract of May 12, 1903, which is inconsistent with the further right of indemnity now claimed.

Secondly, the reports made by the applicant were within the direct scope of his employment as defined by the agreement of May 12, 1903, and the subsequent letter of June 11; but whether they were within the direct scope of his employment or not, it was the applicant's duty to make these reports, and in the view of all the judges before whom the case came the occasion was considered privileged, and as the final result of the proceedings in the case they must be held to have been made without malice. Whether, therefore, these reports were the direct or indirect result of his employment the applicant is equally entitled to the indemnity claimed. [*Halbronn* v. *International Horse Agency and Exchange* (2); *In re Wells and Croft* (3); Bowstead on Agency, 5th ed. pp. 216, 218; Wright on Principal and Agent, 2nd ed. p. 269; and Macdonell on Master and Servant, 2nd ed. p. 144, were also cited.]

Sargant J. stated the facts as above set out and continued: Before dealing with the law on the subject, I ought to deal with two questions of fact. In the first place, in what position do I now stand with regard to the question whether the statements made by Mr. O'Driscoll were privileged or not? The difficulty is that, though the verdict of the jury has been set aside and a new trial has been ordered, there has been no final determination of fact as between Mr. Pape and Mr. O'Driscoll in all the lengthy proceedings which have taken place. There is, however, one fact—perhaps the only fact—on which all the learned judges before whom the case came were agreed, namely, that on Mr. O'Driscoll discovering the facts which he alleged he had discovered, or which he did discover, it was his duty to disclose them to his

(1) [1911] 1 Ch. 425. (2) [1903] 1 K. B. 270.
(3) (1895) 72 L. T. 359.

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principals. That being so, it seems to me that I ought at the present time undoubtedly to come to the conclusion that the occasion was a privileged occasion. Then ought I to come to the conclusion that there was malice on the part of Mr. O'Driscoll? It seems to me that I should not be justified in coming to that conclusion. The onus of proving malice is on those who allege malice. The verdict of the jury on that point has been set aside. I quite realize what is said by the liquidator of the company, that he can hardly be expected to go through proceedings such as those which were gone through in the libel and slander action for the purpose of proving malice. That, however, is his misfortune. As the matter stands on the evidence before me, I do not see how I can say that the onus of proving malice has been discharged by the company, and therefore the facts with which I have to deal are that the communications made by Mr. O'Driscoll were privileged communications with regard to which he has not been shewn to have been actuated by malice. The second question of fact is this: Was it within the direct terms of the employment of Mr. O'Driscoll to make these reports charging Mr. Pape with these frauds? On that my finding of fact is against Mr. O'Driscoll. In my opinion under the terms of the agreement of employment of May 12, 1903, even coupled with the letter of instructions of June 11, 1903, the employment of Mr. O'Driscoll was the ordinary employment of a mining engineer, to visit the country, investigate the state of the properties, determine whether options should be exercised or not, and so on, and make a report with reference to the properties. It must be remembered that Mr. Pape was the chairman and the managing director of the company, and notwithstanding the passage to which I have referred in the letter of June 11, 1903, I cannot come to the conclusion that it was any part of the direct terms of Mr. O'Driscoll's employment that he should go out for the purpose of making a report to the company whether the chairman and managing director of the company, who concurred in his appointment, had been guilty of fraudulent conduct towards the company. The discovery of the facts in question and the reports made by Mr. O'Driscoll with reference to those facts were in my view rather

in the nature of a by-product of his employment than any part of his direct employment, and in my opinion he never was constituted the agent of the company for the purpose of making an investigation of that kind. None the less it may have been, and I think it was his duty, when he discovered those facts, to make a report to the company, but I do not think that he was employed for the purpose of investigating those facts or making that report.

In that state of things, what is the position of Mr. O'Driscoll with reference to his claim for indemnity? The argument has been based upon two grounds. First, it is said that Mr. O'Driscoll as a servant of the company is entitled to the benefit of article 143 of the articles of association of the company. [His Lordship read the article and continued.] I pass by for the moment the question which is of greater importance when I come to deal with the common law liability or common law right to indemnity, whether that article refers to anything beyond the liability or right arising out of the direct employment of the servant, but in my opinion it is perfectly clear on the authorities that Mr. O'Driscoll is not entitled to the benefit of that article, which is an article constituting a contract not between himself and the company but between the members of the company themselves. The familiar cases of *Browne* v. *La Trinidad* (1) and *Eley* v. *Positive Assurance Co.* (2) are ample authority for that proposition, and the present is really a stronger case for the reason given in *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (3), because in the present case there were express provisions inserted in the agreement relating to the question of Mr. O'Driscoll's expenses, and even if the article in question could have formed a contract between Mr. O'Driscoll and the company, it seems to me that that result might very well have been excluded by the express bargain contained in the contract of employment.

The further question then arises whether there is, as contended by counsel for Mr. O'Driscoll, a common law principle under which a servant is entitled to be indemnified by his employer for any loss occasioned to him in the performance of anything which it may be his duty to do. The law as stated in Macdonell

(1) 37 Ch. D. 1. (2) 1 Ex. D. 20, 88.
(3) 39 Ch. D. 339.

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on Master and Servant, 2nd ed. p. 144, is this: "A master is bound to indemnify his servant for all expenses incurred or loss sustained in obeying his lawful orders." That is a far more limited proposition, and one which could only be applicable, if at all, to the present case, if I had found as a matter of fact that the company had ordered Mr. O'Driscoll to make a report with reference to the conduct of Mr. Pape. As I have already said, I come to the conclusion that the company never did order Mr. O'Driscoll to do anything of the sort. I cannot find that the right of indemnity extends, as alleged on behalf of Mr. O'Driscoll, to indemnify a servant from the consequences of doing anything that it may be his duty to do. If that were so, I think there would have been ample authority to be found in the books, because it so frequently happens that it is the duty of one servant to report to his employer a breach of duty on the part of some other servant, and if there had been any principle under which the person making the report was entitled to be indemnified by the employer against the consequences of that report, such as a libel or slander action, I think there would have been many instances to be found in reported cases. The only case which has been cited in support of the alleged principle is *The James Seddon* (1), a decision of the Admiralty Court in the year 1866, the facts of which were rather peculiar. The head-note to the report is as follows: "A master, while at a foreign port with a homeward bound vessel, incurred expenses in defending himself against a charge of murder maliciously brought by two of the crew, whom he had censured for misconduct. The master was tried and acquitted, and bound over in the sum of 10*l.* to prosecute the men for perjury. He forfeited the 10*l.* in order to return with the vessel to England:—*Held*, on a motion to review the report of the registrar in a suit for disbursements, 1st, That the master was entitled to the expenses of his defence, on the ground that the charge originated directly from the performance of his duty to his owners in chastising the men. And, 2ndly, the Court allowed the 10*l.* forfeit, as it was for the interests of his owners that the master should not be delayed in returning with the vessel."

(1) L. R. 1 A. & E. 62.

That case undoubtedly goes a long way; but when I look at the reason for the decision, I find that it is put on the peculiar circumstances affecting trading vessels which may be absent from this country for a year or more in foreign parts, and it is observable that the reason particularly given for the indemnity to the master was not that he was entitled to protect his own neck at the expense of the employers, but that it would have been inconvenient to his employers if he had been imprisoned or incarcerated and had therefore been unable to bring his vessel back to England; and in the same way the 10*l.* forfeit which he had incurred through a breach of the local law was justified on the same grounds as being something incurred for the benefit of his employers. Further, in Bowstead on Agency, 5th ed. p. 218, the case is spoken of as a case where the master was defending an action on behalf of his principals. It is not there cited as an authority that the master was entitled to the expense of defending an action on his own account because the position in which he was placed was brought about through his performing a duty towards his employers, but it is referred to merely as a case in which he was defending an action on behalf of his principals.

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In the present case it is in my opinion quite impossible to say that Mr. O'Driscoll was defending an action on behalf of his principals; he was defending, and as it turned out successfully defending, an action on his own behalf which originated out of reports made by him in the execution of a duty which he owed to his employers but not in direct obedience to their orders; and I cannot find that any case has gone the length of deciding that a servant is entitled to be indemnified by his master against expenses of that character. I must therefore dismiss this application with costs.

A. C.

Mr. O'Driscoll appealed. The appeal was heard on July 20 and 21, 1914. C. A.

Hon. Frank Russell, K.C., and *Douglas Hogg*, for the appellant.

Gore-Browne, K.C., and *E. W. Hansell*, for the liquidator.

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LORD COZENS-HARDY M.R. said that Mr. O'Driscoll was much more than a servant of the company and the duties imposed upon him were far wider than those of a consulting engineer. He was undoubtedly appointed to be the agent of the company for many purposes and all he had done was done in pursuance of his duties as agent. Therefore he came within the well settled rule that an agent had a right against his principal, founded upon an implied contract, to be indemnified against all losses and liabilities, and to be reimbursed all expenses incurred by him in the execution of his authority. The appeal must be allowed.

SWINFEN EADY L.J. and PICKFORD L.J. gave judgment to the same effect.

Appeal allowed.

Solicitors: *Simmons & Simmons; Mayo, Elder & Co.*

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May 7.

[1913 B. 4260.]

Revenue—Licensed Premises—Increase of Duty—Lease—Liability of Grantor of Lease to pay Proportion of Increase—"Grantor of Lease"—Person in receipt of Rents—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 46—*Finance Act*, 1912 (2 *& 3 Geo.* 5, *c.* 8), *s.* 2.

Sect. 2 of the Finance Act, 1912, provides that where licensed premises are held under a lease made before the passing of the Finance (1909-10) Act, 1910, which does not contain any covenant by the lessee to obtain a supply of intoxicating liquor from "the grantor of the lease," the lessee shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from, or deduct from any sum due to, "the grantor of such lease" a proportion of any increase of duty payable in respect of the licence under the Finance (1909-10) Act, 1910:—

Held, that the words "grantor of the lease" must be read in their strict sense as meaning the original grantor of the lease and do not include a person who was for the time being in receipt of the rent of the demised premises.

Witness Action.

By an indenture of lease dated May 11, 1892, and made between Joseph Brown Martin and the plaintiff company in consideration of a premium of 2000*l.*, as to 1000*l.* paid by the plaintiff company on the execution of the lease and as to 1000*l.* covenanted to be paid by the plaintiff company on May 11, 1893, Martin demised to the plaintiff company certain licensed premises being the whole of the basement and part of the ground floor of Nos. 2 and 3, Bedford Street, Strand, in the county of Middlesex, for a term of ninety-nine years from September 29, 1891, at the yearly rent of 900*l.*, the plaintiff company paying rates and taxes. The lease did not contain or import any covenant, agreement, or undertaking on the part of the lessees to obtain a supply of intoxicating liquor from the lessor.

The plaintiff company duly paid the second sum of 1000*l.* so covenanted to be paid by them.

The plaintiff company alleged that the reversion in the premises expectant upon the term of ninety-nine years was at all

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material times and was now vested in the defendant, who was at all material times in receipt from the plaintiff company of the rent reserved by the lease.

The annual duty payable in respect of the licence for the demised premises prior to the Finance (1909-10) Act, 1910, was 51*l.* 8*s.* 6*d.* The annual duty payable since that Act was 278*l.* 11*s.* 5*d.* The increase of the duty under the Act amounted to 227*l.* 2*s.* 11*d.*

The plaintiff company had paid the duty of 278*l.* 11*s.* 5*d.* for the year ending September 30, 1913.

The plaintiff company alleged that the full rental value of the demised premises if the same were unlicensed would be less than the sum of 900*l.* per annum, and claimed in this action a declaration that by virtue of s. 2 of the Finance Act, 1912 (1),

(1) Finance Act, 1912 (2 & 3 Geo. 5, c. 8), s. 2: "Where the licensed premises are held under a lease or agreement for lease made before the passing of the Finance (1909-10) Act, 1910, which does not contain or import any covenant, agreement, or undertaking on the part of the lessee under such lease or agreement for lease to obtain a supply of intoxicating liquor from the grantor of the lease or agreement for lease, the lessee under such lease or agreement for lease shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from, or deduct from any sum due to, the grantor of such lease or agreement for lease so much of any increase of the duty payable in respect of the licence under the provisions of the Finance (1909-10) Act, 1910, as may be agreed upon as proportionate to any increased rent or premium payable in respect of the premises being let as licensed premises, and, in default of agreement, the amount proportionate to such increased rent or premium shall be determined in manner directed by rules of Court by a county court in England or Ireland, and by a sheriff court in Scotland.

"The words 'lease,' 'leased,' 'agreement for lease,' and 'lessee' in this section include sub-lease, sub-leased, agreement for sub-lease and sub-lessee, respectively."

Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 46: "Where the licence holder is bound by any covenant, agreement, or undertaking, or is otherwise under any direct or indirect obligation of any kind, to obtain a supply of intoxicating liquor from any person or persons, the licence holder shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from or deduct from any sum due to any such person so much of any increase of the duty payable in respect of his licence occasioned by this Act as may be agreed upon, or in default of agreement determined by the Commissioners to be proportionate to any increased rent of the licensed premises, or increased prices of intoxicating liquor supplied, or other benefit

they were entitled to recover as a debt due from or to deduct from any sum due to the defendant so much of the increase of the duty payable in respect of the licence under the provisions of the Finance (1909-10) Act, 1910, as was proportionate to the increased rent and premium payable in respect of demised premises being let as licensed premises, or alternatively so much of the increase of duty as was proportionate to such increased rent.

The defendant by his defence denied that he was the grantor of the lease and alleged that the plaintiff company were not the holders of the licence.

At the trial before Warrington J. on May 7, 1914, the plaintiff company proved that from the year 1896 the rent of the premises had been demanded by and paid to the defendant.

The licence of the premises was in the name of D. H. Beardon, the secretary of the plaintiff company, who held it as their nominee.

Clauson K.C., and *Harold Burrows*, for the plaintiff company. The main question in this case is whether the defendant is the "grantor of the lease" of the premises in question within the meaning of s. 2 of the Finance Act, 1912. The meaning to be attached to these words has been considered by a number of county court judges, and there are county court decisions in favour of the plaintiff company's contention, but so far there has been no High Court decision upon the point. It is submitted that the term "grantor of the lease" in the section ought not to be limited to the original grantor, but that it includes any assignee of the reversion who at the time when the duty becomes payable is in receipt of the rent of the licensed premises and in the enjoyment of the advantages of the increased rent payable by reason of the premises being let as licensed premises. The persons between whom the increased licensed duty is to be shared, as intended by the section, are the person for the time being claiming and receiving the rent and the person actually in possession of the licensed premises. Any

obtained by such person by reason of any such covenant, agreement, undertaking, or obligation as aforesaid."

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other interpretation would render a person, who as original grantor may have long since ceased to have any beneficial interest in the premises, liable to pay this share of the duty, whilst the person actually receiving the rent would pay nothing.

It is said, however, that the plaintiff company are not the holders of the licence, inasmuch as it stands in the name of their secretary. The plaintiff company, however, are a limited company, and it is not in accordance with the general practice to grant licences to limited companies. The licence in the present case was granted to the secretary as the nominee of the plaintiff company and they are in effect the holders of it: *Dixon* v. *Birch*. (1) *Watney, Combe, Reid & Co.* v. *Berners* (2), in which it was held that s. 2 of the Act of 1912 did not apply to the case of a lessee of licensed premises who had sub-let the premises and was not himself the holder of the licence, has no bearing on this case.

Gordon Hewart, K.C., and *C. Zeffertt*, for the defendant. The plaintiff company have not, it is submitted, made out any case for the defendant to answer. It is not necessary for the defendant to define the meaning of the words "grantor of the lease" in the section. The plaintiff company have not proved that they stand in such a relation to the defendant as to entitle them to recover against him. The burden is not on the defendant to prove that he is not a person against whom such a declaration as is asked in the present case can be made. The burden is on the plaintiff company to shew that he is. The plaintiff company have merely proved that for some time past the defendant has lawfully been receiving the rent of the premises. But the mere fact that the defendant has received the rent is not sufficient to make him the "grantor of the lease" and thereby to subject him to the burden imposed by s. 2 of the Act. He may have been receiving the rent, for example, as mortgagee in possession, or as trustee. There is no evidence before the Court that the defendant is in the position of a "grantor of the lease" even using the words in the extended sense as suggested by counsel for the plaintiffs. There is no evidence as to the defendant's title, and the onus of proof has not been discharged.

[They were stopped.]

(1) (1873) L. R. 8 Ex. 135. (2) [1913] 3 K. B. 427.

Clauson, K.C., and *Harold Burrows*. The receipt of rent by the defendant is prima facie evidence of his seisin: Roscoe's Nisi Prius, 18th ed. p. 1037. The defendant is therefore to be regarded as owner until he proves that he is not. It is impossible for the plaintiff company to take upon themselves the burden of proving the defendant's title.

[WARRINGTON J. My view upon the present evidence is that the plaintiff company have proved prima facie that the defendant is in receipt of the rent of the premises under a title which entitles him to receive it. Whether that brings him within the section is another matter.]

The following additional facts were then admitted or proved:— Martin was the freeholder of the premises in question at the date of the grant by him to the plaintiff company of the lease of May 11, 1892. In December, 1892, Martin sold the freehold of the premises to Brymer's trustees, and they contemporaneously granted to one Kirk a lease of the whole of the premises Nos. 2 and 3, Bedford Street, for ninety-nine years from September 29, 1892, subject, amongst other leases, to the plaintiff company's lease. On April 9, 1896, Kirk assigned his lease to the defendant Read, subject to certain mortgages, and the defendant had been in receipt of the rent of the premises by virtue of that assignment.

Gordon Hewart, K.C., and *C. Zeffertt*. Assuming that the plaintiff company have proved what is suggested, still that is not sufficient to bring the defendant within the section. The person meant by "grantor of the lease" is, it is submitted, the original grantor and he only. Nor is there anything inequitable in this, as has been suggested by the plaintiff company, for it was this grantor who first obtained the profit caused by the premises having been licensed. The person who takes by assignment from him pays for this profit. There is no ground for extending the ordinary meaning of the words. If the term "grantor of the lease" was intended to mean the person for the time being entitled to the receipt of the rent it would have been easy for the Legislature to have said

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so. What the defendant really has is the equity of redemption in Kirk's leasehold interest in the premises, and under those circumstances he ought not to be held liable. The defendant also takes the point that the plaintiff company are not the licensees of these premises.

Clauson, K.C., in reply.

WARRINGTON J. The question in this case is whether the defendant is upon the true construction of s. 2 of the Finance Act, 1912, "the grantor of the lease" under which the plaintiff company hold certain licensed premises.

The facts are these: By a lease dated May 11, 1892, one Martin, who was then seised in fee, granted to the plaintiff company a lease for ninety-nine years from September 29, 1891, of the basement and ground floor of two houses known as Nos. 2 and 3, Bedford Street, Strand. The rent was 900*l.* a year, and the plaintiff company undertook to pay two sums of 1000*l.* each by way of premium, one on the execution of the lease, and the other on May 5, 1893. On December 5, 1892, Martin informed the plaintiff company that his interest in the premises was then vested in one Kirk, and as a matter of fact the second of the two instalments of the premium was, on May 5, 1893, paid by the plaintiff company to Kirk. The facts with regard to that have been admitted and they are these: In December, 1892, Martin sold the freehold of the premises to certain persons who may be conveniently described as Brymer's trustees, and they contemporaneously with the sale to them granted to Kirk a lease of the whole of the same premises for ninety-nine years from September 29, 1892, subject to the plaintiff company's lease and to certain other leases of other portions of the premises which had then already been granted. On April 9, 1896, Kirk assigned his lease to the defendant subject to certain mortgages which he had created in the meanwhile, whether by assignment or sub-demise appears to be uncertain, but that fact is immaterial. The defendant has been in the receipt of the rents and profits of these premises by virtue of the assignment to him of Kirk's lease. The legal position therefore is this: At law the reversion immediately expectant on the

determination of the plaintiff company's lease is vested in Kirk's mortgagees whether they take by assignment or sub-demise; but the mortgagees are not in possession, and the defendant, as is often the case, although his estate is merely one in equity, is in receipt of the rents as the owner in equity, or, as he is sometimes called, the owner of the equity of redemption of Kirk's lease. The fee simple of the reversion is vested in Brymer's trustees or those claiming under them. Whether they have made any further grant of it I do not know. Now, the premises were let as licensed premises: the licence is actually in the name of D. H. Beardon, the secretary of the plaintiff company, who holds it merely as trustee for them and has no personal interest in it. He has no tenancy, agreement for a tenancy of the premises, or anything of that sort. He simply holds the licence because he is the secretary of the plaintiff company, which carry on the business of victuallers under the licence upon these premises. Those, I think, are all the material facts.

The present action is brought by the plaintiff company claiming to be lessees of these licensed premises against the defendant for the amount which they say is payable to them under s. 2 of the Finance Act, 1912, as the proportion under the section payable by the grantor of the lease of the increased licence duty imposed by the Finance (1909-10) Act, 1910. The section is unquestionably one that it is very difficult to construe—difficult, that is, if one attempts to give to the words used some meaning other than their strict meaning. The section is in these terms: "Where the licensed premises are held under a lease or agreement for lease made before the passing of the Finance (1909-10) Act, 1910, which does not contain or import any covenant, agreement, or undertaking on the part of the lessee under such lease or agreement for lease to obtain a supply of intoxicating liquor from the grantor of the lease,"—I pause there for one moment. All that that really means is that the premises are a free house held under a lease. The section then goes on to provide that in such a case "the lessee under such lease or agreement for lease shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from, or deduct

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from any sum due to, the grantor of such lease or agreement for lease so much of any increase of the duty payable in respect of the licence under the provisions of the Finance (1909-10) Act, 1910, as may be agreed upon as proportionate to any increased rent or premium payable in respect of the premises being let as licensed premises, and, in default of agreement, the amount proportionate to such increased rent or premium shall be determined in manner directed by rules of Court by a county court in England or Ireland, and by a sheriff court in Scotland." The only interpretation is contained in the following words: "The words 'lease,' 'leased,' 'agreement for lease,' and 'lessee' in this section include sub-lease, sub-leased, agreement for sub-lease, and sub-lessee, respectively." Perhaps I may mention in passing that though an interpretation is given to the word "leased" that word does not appear in the section at all. However, that is only by the way. There is no attempt to give any interpretation to the words "the grantor of the lease."

Now, what is the prima facie meaning of the words "the grantor of the lease"? I think they mean quite plainly the man who puts his hand and seal to the document in question —the man who grants the land for the term for which it is to be vested in the lessee. But it is said that you ought not to give that strict construction to the words, and that if you do so you will defeat the obvious intention of the Legislature. What the intention of the Legislature was, except as expressed in the words used in the section, I do not know. What is presumed to be their intention is derived to some extent from previous history. The previous history is that by the Act of 1910, by which the increased duty was first imposed (which is the Act referred to in this section), provision was made for the case of what I may call, and what are generally known as, "tied" houses, that is to say, houses the tenants of which are bound to take their liquors from particular persons. The Act provided for the division of the increased duty between the person from whom the liquors were to be taken and the licence holder, and it is said that s. 2 of the Act of 1912 was intended to fill up a gap which had been left unfilled in that previous Act, and to put the licence holder whose house was not a tied house in the same

position in relation to his landlord as was the case of the licence holder in the case of a tied house. That may have been so, but I have to see what the expression is which the Legislature has used. The expression used is "the grantor of the lease." I go with Mr. Clauson so far that I should have been very much inclined, and I have been very much inclined all through the argument, if I saw my way to do it, to give the wide construction to this expression. Mr. Clauson says I ought to say that the expression "the grantor of the lease" not only includes but means the person who, by virtue of the lease, is bound to allow the lessee the possession of the premises and is in actual receipt of the rent. But how can I get that meaning out of the words? In the first place, if I say the expression means that, I do not quite know where it may land me. In the present case the person against whom the action is brought is after all only a lessee; he is a lessee for ninety-nine years; but he would be in just the same position if he were a lessee for twenty-one years, and under that title in receipt of the rents and to that extent the owner of the reversion. On the other hand, if the strict meaning is given to the words "the grantor of the lease," I do not see that it makes the section so absurd as has been suggested, because the grantor of the lease is the person who by granting it gets vested in himself the reversion expectant on the lease, the rent reserved by which is assumed to be increased by the fact that the premises are let as licensed premises. Therefore, he has the property vested in him increased in value by reason of the licence, and it may well be that the Legislature thought that it should be he or his representatives against whom the proportionate part of the increased duty should be recovered. On the other hand, it may be, as Mr. Clauson has suggested, that they never really thought who it was to be, and meant to use some expression which would be as comprehensive as possible and would hit any one who happened to be in receipt of the rent; but then I may point out that that would give rise to unending difficulties in ascertaining who the person is who has to pay. Suppose, for example, that a grantor after having granted a lease settled the property in strict settlement, who then is to be the person who has to pay? Is it to be

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the tenant for life? Is it to be the person who is in receipt of the rents, who may perhaps be a jointress who happens to be receiving the rents by virtue of a power in the settlement to receive the rents in order to enforce her jointure? Such a construction as is suggested involves one in endless guesses and conjectures as to what is the meaning of the Legislature. In my opinion the only safe course to adopt in such a case is to take the words used by the Legislature and say that they bear the meaning ordinarily attached to them. In my opinion, I cannot say that the defendant in this case, who is a mere lessee of the reversion expectant on the determination of the plaintiff company's lease, can be treated as "the grantor of the lease" within the meaning of this section. In fact I think the word "grantor" there means what it says, namely, the person who actually puts his signature and seal to the lease.

There is one other point which I may dispose of and which I can dispose of very shortly indeed. It is said that in the present case the plaintiff company cannot recover because they are not the holders of the licence, and reliance is placed on *Watney, Combe, Reid & Co.* v. *Berners.* (1) That case decided that where there was a lessee and a sub-lessee, and the sub-lessee was the holder of the licence, the lessee could not recover from his lessor a contribution in respect of increased licence duty. In my opinion, that decision has no application to the present case. Here the lessees are to all intents and purposes the licensees, because, being a limited company, the licence is held in the name of another person who is their servant or nominee. In my opinion, that is a bad point.

On the other point I must dismiss the action, and dismiss it with costs.

Solicitors: *Treherne, Higgins & Co.; Zeffertt & Co.*

(1) [1913] 3 K. B. 427.

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May 12, 13 14, 15, 18, 29.

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[1913 W. 1351.]

Town Moor—Freemen's Right to depasture Cattle on Moor—Stint Tickets—Transferees of Stint Tickets—Temperance Festival on Moor—Roundabouts and Shows—"Fair"—Injury to Herbage—Injunction—Measure of Damages—Town Moor Act, 1774 (14 *Geo.* 3, *c. cv.*), *ss.* 1, 3, 4—6, 7, 8, 10—*Newcastle-upon-Tyne Improvement Act*, 1870 (33 *& 34 Vict. c. cxx.*), *ss.* 6, 7, 8, 11, 12, 17, 19.

By special Acts of 1774 and 1870 the right of resident freemen and widows of resident freemen of the town of Newcastle-upon-Tyne to depasture two milch cows each on the Town Moor was established and regulated, the number of cows to be depastured in any one year on the moor being limited to 800, and every freeman and widow of a freeman was entitled in April of each year on application to their stewards and wardens to a stint ticket for two milch cows to be depastured on the moor, which was transferable to any resident inhabitant of the town, but no person was to hold more than ten such tickets. In 1912 the area of the moor available for pasturage was insufficient to carry the statutory number of cows.

The Act of 1774 authorized the corporation at the request of the stewards and wardens from time to time to grant leases of parts of the Town Moor for the purpose of improving the same, but s. 7 enacted that no lease should be granted of that part of the Town Moor called the Cowhill and such part adjoining the same as should be necessary for holding the Cowhill fairs, nor of another part of the moor called the Race ground, nor of any part of the moor where any booths, stalls, and other erections had been set up during the holding of the said fairs or horse races, but the same should be preserved for fairs and horse races as theretofore. The Act of 1870 (s. 6) constituted a committee of the stewards and wardens, to be elected annually, to act for the stewards and wardens and for the freemen and widows of freemen for all purposes relating to the Town Moor, and (s. 8) authorized the committee and the corporation from time to time to enter into agreements for the appropriation of parts of the Town Moor for not exceeding ten days at a time for agricultural shows or other public purposes.

Prior to 1882 horse races with attendant roundabouts and shows had for many years been held on the race ground on the Town Moor, but in that year they were and ever since had been held elsewhere. From 1882 down to 1912 a temperance festival was annually held on the old race ground on the moor with the joint consent of the committee and of the corporation, by whom various persons, including the defendants, were from time to time licensed to bring roundabouts and shows, and it had grown into a gathering of many thousands of people. In 1912 the heavy traction engines used by the defendants cut up the surface of the moor and seriously damaged the herbage; consequently, in 1913 the

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committee, while consenting to the festival being held as usual on the moor, declined to join with the corporation in granting a licence to the defendants. The corporation nevertheless granted the defendants a licence, and damage ensued to the herbage. Most of the holders of stint tickets for the years 1912 and 1913 were not freemen but persons who had purchased tickets from freemen. In an action by the committee against the defendants for an injunction to restrain them from bringing their roundabouts and shows on to the moor, and for damages, the corporation not being parties to the action:—

Held, that neither the horse races nor the temperance festivals with the attendant roundabouts and shows were a fair within the meaning of s. 7 of the Act of 1774, and that the corporation had no power under either of the Acts to grant the licence to the defendants without the consent of the plaintiffs, and an injunction granted accordingly.

Held, also, that the measure of damages was the amount of injury to the herbage, irrespective of whether the stint ticket holders were or were not freemen, it being the duty of the plaintiffs to protect and improve the moor.

WITNESS ACTION.

The Corporation of Newcastle-upon-Tyne were the owners in fee simple of the soil of the Town Moor, subject to the right of the resident freemen or burgesses and resident widows of deceased freemen or burgesses of the town (hereafter referred to as "the freemen") to the herbage of the Town Moor for two milch cows each.

This right of the freemen to depasture two milch cows respectively on the Town Moor was known as "the herbage right."

The Town Moor Act, 1774 (14 Geo. 3, c. cv.), after reciting litigation with respect to the herbage right, by s. 1 established and confirmed to the freemen for ever the full right to the herbage of the Town Moor "for two milch cows respectively in such manner as has been used . . . . subject to such demises, restrictions, and regulations for the culture and improvement of the Town Moor as hereinafter mentioned."

Sect. 3 authorized the inclosure from time to time of part of the Town Moor for improvement, the quantity to be inclosed for such improvement not to exceed 100 acres at any one time.

Sects. 4 to 6 empowered the stewards and wardens of the several companies of the town of Newcastle-upon-Tyne and the corporation to grant leases of any part of the Town Moor, not

exceeding 100 acres, proposed to be inclosed for improvement, and s. 8 directed that the rents reserved by such leases should be distributed amongst the poor freemen not having any cow upon the Town Moor.

Sect. 7 provided that no demise should be made by virtue of the Act "of a certain parcel of the said Town Moor called the Cowhill, and such part of the Town Moor adjoining the same, as shall be necessary for holding the fairs commonly called the Cowhill Fairs, nor of another parcel of the said Town Moor called the Race ground, nor of any part of the Town Moor lying within the inner ditches of the said Race ground . . . . nor on any part of the said Town Moor where any booth or booths, stall or stalls, stand or stands, hut or huts, or other temporary erections have been usually made or set up during the holding of any of the said fairs or horse races respectively; but the same shall be preserved for fairs and horse races as heretofore; anything herein contained to the contrary thereof in any wise notwithstanding."

Sect. 10 enacted that "nothing in this Act contained shall extend or be construed to extend to take away, annul, or alter any of the rights which the Corporation of Newcastle-upon-Tyne, as owners of the soil of the said Town Moor . . . . are entitled unto, or to give to them any new or other rights than they are now entitled to."

The Newcastle-upon-Tyne Improvement Act, 1870 (33 & 34 Vict. c. cxx.), after reciting, amongst other things, the herbage right and the Act of 1774, and that the Town Moor might be made much more beneficial to the borough than it then was if it were placed under a better system of management, enacted:—

Sect. 6. "There shall be for the purposes of this Act a committee of stewards and wardens chosen out of and by the genera body of stewards and wardens on Michaelmas guild day in each year . . . . and consisting of nine members, of whom three shall be a quorum, which committee shall be by virtue of this Act authorized and required to act for and on behalf of the stewards and wardens and freemen and widows of freemen for all purposes relating to the Town Moor."

Sect. 7 empowered the corporation to appoint out of the

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council a committee to whom they might delegate for twelve months such of the powers and duties of the corporation under the Act as related to the Town Moor.

Sect. 8. "The corporation and the committee of stewards and wardens may from time to time enter into and carry into effect such agreements as they may think fit for the purposes in this section of the Act mentioned in relation to the Town Moor, and in particular, but not so as to affect the generality of this provision, for, amongst other things, ... the appropriation of part or parts of the Town Moor for the space of not exceeding ten continuous days for the purposes of agricultural shows, public reviews, or other public purposes . . . . and all such agreements shall be binding on the corporation and the stewards and wardens and the freemen and widows respectively . . . ."

Sect. 11 repealed the provision in the Act of 1774 which required every resident freeman or resident widow of any freeman, before depasturing any cow on the Town Moor, to state on oath that the cow was his or her property; and, after limiting the number of cows to be depastured upon the Town Moor in any one year to 800, provided for the issue of stint tickets to every freeman applying for the same before April 1 in each year. If there were more applicants than tickets, then there was to be a ballot, and the successful applicants at the ballot were to receive stint tickets to depasture cows upon the Town Moor for one year from May 12 then next on prepayment of a certain sum to be applied in discharge of the necessary expenses of herding and otherwise respecting the cows depastured upon the Town Moor, and the several holders of stint tickets might "transfer the same to any resident inhabitant of the borough for such consideration as they may think fit, so as no one person do hold more than ten of such tickets."

Sect. 12 provided for the annual payment of 400*l.* out of the borough funds to the committee of stewards and wardens to be applied by them in draining and improving the herbage of the Town Moor.

Sect. 17 directed (inter alia) that all money paid for the erection of tents and stands upon the Town Moor during the holding of races and fairs should be paid to the corporation, who

should thereout defray the expense of reinstating the ground that might be damaged or injured, and other incidental expenses, and might pay over the surplus in aid of the race fund as theretofore accustomed.

Sect. 19 provided that nothing in the Act contained should in any way prejudice, vary, alter, or affect the positions and reservations contained in the Town Moor Act, 1774, relating to the holding of races and fairs and the erection of tents and stands on such occasions.

For very many years prior to 1882 the Newcastle races were held annually on the race ground on the Town Moor, but in that year they were and ever since had been held annually at Gosforth Park during the last week in June. In 1882 the committee of stewards and wardens and the corporation jointly concurred in granting permission for a temperance festival to be held on the Town Moor during the last week in June, and in granting a licence to certain persons, who had attended the races in previous years, to attend the festival with their roundabouts and shows. From 1882 down to and including the year 1912 this festival with its attendant roundabouts and shows had been annually held on the Town Moor during the last week in June with the joint consent of the committee and corporation, and had gradually grown into a gathering of very large numbers. The year 1912 was very wet and the surface of the Town Moor was much cut up by the heavy traction engines and other vehicles used by the defendants, who were amusement caterers, in bringing their roundabouts and shows to the festival, and the herbage was seriously damaged. Consequently the committee in the spring of 1913, while consenting to the festival being held as usual on the Town Moor during the last week in June, declined to concur in granting a licence to the defendants to bring their roundabouts and shows to the festival on the ground that, having regard to the injury done to the herbage the previous year, it was essential in the interests of the freemen that the moor should have an entire rest, and that there should be no letting that year. The corporation nevertheless granted the defendants a licence in writing to bring their roundabouts and shows to the festival in consideration of 1050*l.*,

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the defendants covenanting to do as little damage as possible to the herbage and soil of the Town Moor and to make good such damage to the satisfaction of the city engineer, and the corporation covenanting to indemnify the defendants against the costs of and to defend all proceedings that might be brought against the defendants by any person or persons. Thereupon the plaintiffs, being the committee of stewards and wardens appointed under the Act of 1870, and suing for and on behalf of the stewards and wardens and for and on behalf of the freemen and widows of freemen in the Act mentioned, issued a writ against the defendants on May 27, 1913, claiming an injunction to restrain the defendants from bringing their roundabouts and shows on to the Town Moor, and on June 13, 1913, Neville J., on the application of the plaintiffs, granted an interlocutory injunction; but on June 20 the Court of Appeal, without expressing any opinion on the construction of the Acts, discharged the injunction, and the defendants attended the festival held that month with their roundabouts and shows, and damage was done to the herbage.

The plaintiffs by their statement of claim pleaded the herbage right as established by the Act of 1774 and varied by the Act of 1870, and alleged that the herbage on the moor was insufficient in any one year to support 800 cows; that as the statutory committee chosen under s. 6 of the Act of 1870 they were suing for and on behalf of the stewards and wardens and for and on behalf of the freemen; that no agreement under s. 8 of the Act of 1870 had been entered into between them and the corporation; that the defendants were showmen and threatened and intended without the leave of the plaintiffs to enter upon the Town Moor and to place thereon divers steam engines, shows, caravans, exhibitions, booths, tents and other things of a like nature, and to use and occupy a part or parts of the Town Moor to the exclusion of the cows of the said freemen, whereby the said freemen would not be able to enjoy the herbage right belonging to them in as ample and beneficial a manner as they hitherto had done and were entitled to do; that since the commencement of the action the defendants had entered upon and occupied a part of the Town Moor to the damage of the said freemen; and the

plaintiffs claimed an injunction to restrain the defendants and their servants from bringing on to any part of the Town Moor over which the resident freemen and resident widows of freemen of the city of Newcastle-upon-Tyne had the right to herbage any steam engine, show, caravan, exhibition, booth, tent, or other thing of a like nature; and damages.

By their defence the defendants did not admit that the herbage on the Town Moor was not sufficient in any one year to support 800 cows, nor that the plaintiffs had not entered into any agreement with the corporation under s. 8 of the Act of 1870. They justified their entry upon and occupation of part of the Town Moor for the purpose of erecting the roundabouts and shows during the last week in June, 1913, under a licence granted them by the corporation dated June 4, 1913, whereby they had undertaken to do as little damage as possible and to make good all damage to the satisfaction of the city engineer. They referred to s. 7 of the Act of 1774 and ss. 17 and 19 of the Act of 1870, and alleged that the temperance festival with its attendant roundabouts and shows constituted a fair within the meaning of the Acts of 1774 and 1870, and had always been held on that part of the Town Moor lying within the inner ditches of the race ground; that the plaintiffs had wrongfully refused their consent to the licence of June 4, 1913, and under circumstances which justified the corporation in dispensing with such consent. With respect to the alleged damage to the freemen, they pleaded that not more than 160 milch cows had for some time past been depastured on the Town Moor; that the freemen had no right of pasture over the Town Moor for cows other than milch cows, and, though they used the Town Moor for depasturing cows other than milch cows, such user was wrongful and conferred upon them no right to any relief by injunction or damages; and they alleged that in pursuance of their said undertaking they had effectually made good the damage (if any) occasioned by their occupation of the Town Moor under the licence of June 4, 1913, and that the plaintiffs were amply indemnified in respect of such damage by their said undertaking.

The action now came on for trial. The corporation were not

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made parties to the action, but had passed a resolution instructing the town clerk to defend the action.

It appeared from the evidence that the acreage of the Town Moor available for the herbage right had been reduced from about 1260 acres in 1870, by reason of parts taken from time to time for various purposes under statutory powers, to about 848 acres, and that each milch cow required two acres for pasture; that the site occupied in June, 1913, by the temperance festival and its attendant roundabouts and shows was about seventy-eight acres, of which twenty-three acres overlapped the site that had been occupied by the festival in 1912; that the plaintiffs had expended considerable sums in restoring the herbage of the 1912 site, and that the restoration of the twenty-three acres had been retarded by their being again occupied in 1913 by the festival; that about 169 cows had been depastured on the Town Moor during 1912-13, and that most of the owners of these cattle were not freemen but persons to whom freemen had sold their stint tickets.

Upjohn, K.C., Jenkins, K.C., and *Stuart Moore,* for the plaintiffs. Both under the Acts and on the facts the acts of the defendants were wrongful, but they are nominal defendants. They justify their acts under the licence granted by the corporation, who are the real defendants. The temperance festival proper is unobjectionable in itself; the objection is to the heavy traction engines used to draw enormous roundabouts and shows on to the moor which cut up the surface and destroy the herbage, and the corporation are proposing to let some part of the moor again this year for like purposes. The culture and improvement of the Town Moor and the maintenance of the herbage right are regulated by the Acts of 1774 and 1870, and in particular by the provisions of ss. 1, 3, 4—6, and 8 of the Act of 1774 and ss. 6, 7, 11, 12, and 17 of the Act of 1870. Under the Acts the corporation alone had no power to grant the licence. The defendants rely on ss. 7 and 10 of the Act of 1774 and ss. 8 and 19 of the Act of 1870, but the temperance festival with its roundabouts and shows is not a "fair" within the meaning of s. 7, which relates to the Cowhill fairs, and the acts of the defendants interfere with the herbage rights vested in the freemen. Cowhill is

some three-quarters of a mile away from the site of the festival. Two fairs are held annually for one day at Lammas and in October at Cowhill, one granted by a charter of King John and the other by a charter of Henry VII. It is also submitted that granting permission to private individuals or a company to erect roundabouts and shows on the moor for their private gain is not a public purpose within the meaning of s. 8 of the Act of 1870; but in any event it could only be done with the joint consent of the plaintiffs. Then as to the damage. It is clear that for the full exercise of the freemen's statutory rights to depasture 800 cows some 1600 acres would be required, but the area now available for pasturage is only about 850 acres, and, in considering whether there has been any interference with the freemen's rights, the Court will only have regard to the extent of the common right and the capacity of the moor to depasture the cattle. It is no answer to say that the freemen have not used their rights to the full extent, and it is not necessary to prove any special damage: *Robertson* v. *Hartopp* (1); *Wells* v. *Watling* (2); *King* v. *Brown, Durant & Co.* (3) The measure of damage is the value of the herbage destroyed, including what is called retardation.

Peterson, K.C., and *Dighton Pollock*, for the defendants. The question whether the plaintiffs are entitled to an injunction depends upon the construction of s. 7 of the Act of 1774, which is in no way modified by the Act of 1870. The section prohibits any lease being made under the Act for the inclosure or otherwise of the Cowhill fairs, of the racecourse, and of the land inside the racecourse. "Fair" is a word which may be used in two senses. It may be a market where nothing is done but buying and selling goods, or it may mean something in the nature of a pleasure fair, or it may be a mixture of the two. The horse races carried on upon the race ground up to 1882 were always accompanied with roundabouts and shows, and similar contrivances were continued at the temperance festivals. In *Collins* v. *Cooper* (4) the defendant brought on to his land roundabouts and shows for the amusement of the people, and was

(1) (1889) 43 Ch. D. 484, 500.
(2) (1779) 2 W. Bl. 1233.
(3) [1913] 2 Ch. 416.
(4) (1893) 68 L. T. 450.

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convicted under a private Act for holding a "fair" on his land, and the decision of the magistrates was affirmed by the Divisional Court. It is true that Bruce J., the junior judge, delivered a dissenting judgment holding that the word "fair" was used in its proper sense as a mart for selling goods and did not include gatherings where amusements only were provided, but he withdrew his judgment and the conviction stood.

[NEVILLE J. I prefer the judgment of Bruce J. and I adhere to the view that I expressed on the motion for an interlocutory order. In my opinion the fairs and races mentioned in s. 7 do not include this temperance festival, and the only power the corporation can have to license the user of any part of the Town Moor for the festival is to be found in s. 8 of the Act of 1870, and that can only be done with the assent of the committee of stewards and wardens.]

It is submitted that there has always been a fair on the race ground in June of every year, first in conjunction with the races and afterwards in conjunction with the temperance festival, and therefore that under s. 7 that ground is always to be "preserved for fairs as heretofore," and the corporation were justified in granting the licence for the purposes of the fair. With regard to the damages, it is open to the defendants to shew that no actual damage has been sustained by the freemen and that the plaintiffs are only entitled to nominal damages for the trespass of the defendants. This is an action on behalf of the freemen and for damage done to the freemen, and cannot include damages sustained by transferees of stint tickets from the freemen, and the greater part of the persons said to be damaged by the 1913 festival were people who were not freemen. The whole body of freemen cannot sue, but the only persons who can sue, if there are any, are the persons who have suffered actual damage. If the plaintiffs recover damages for the trespass, they will not go to the transferees of the stint tickets for that year, but they will go for the benefit of the freemen who sold their tickets and have had the money. No actual damage to any freeman has been proved, and the pasturage that was left was ample for the cows grazing on the moor. On the evidence it is submitted that it is a case for nominal damages, but that, if there has been any

damage, the fair measure of damages is the value of the stint tickets.

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Jenkins, K.C., in reply on the measure of damages.

May 29. NEVILLE J. to-day delivered judgment as follows: Since 1882, by agreement between the committee of stewards and wardens, appointed under s. 6 of the Newcastle-upon-Tyne Improvement Act, 1870, and the Corporation of Newcastle, a temperance festival has been usually held upon the Town Moor. The year 1912 was exceptionally wet, and much damage was caused to the surface of the moor by the holding of the festival in that year, accompanied as it was by a great collection of roundabouts and other amusements, many of them drawn by heavy traction engines. As a result the committee in the year 1913, though consenting to the holding of the temperance festival, refused their consent to the letting of sites for these roundabouts and amusements. The corporation thereupon determined in spite of the opposition of the committee to let to the present defendants sites for their roundabouts, &c., for the festival which was to be held in June, 1913. The committee on May 27, 1913, commenced this action against the defendants claiming an injunction restraining them from bringing their roundabouts upon the land, and moved for an interlocutory injunction. The defendants justified their proposed action by the authority of the corporation under an agreement dated June 4, 1913, made between the corporation and the defendants. This defence raised the question of the right of the corporation to let sites on the Town Moor for such purposes without the consent of the committee. The rights of the corporation and of the committee rested upon two Acts of Parliament, one passed in 1774 and the other in 1870, the defendants asserting that upon the true construction of one or other of these Acts the corporation had power to enter into the agreement relied upon, and the plaintiffs alleging that without their consent such an agreement was beyond the powers of the corporation. The construction of these Acts of Parliament was independent of any facts in dispute in the action. That being so, I thought it desirable to express my opinion upon the construction of the Acts, and, having come

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to the conclusion that the corporation had not without the concurrence of the committee any power to enter into the agreement in question, I granted an interlocutory injunction restraining the defendants from bringing their roundabouts upon the moor. This order was appealed from and, the defendants opposing the determination of the question of law upon interlocutory application, the Court of Appeal dissolved the injunction without expressing any opinion upon the construction of the Acts. In the result the defendants brought their roundabouts upon the moor and occasioned considerable damage to the herbage. The trial of the action has lasted four or five days and very heavy costs have been incurred in determining the question of damages. The legal question as to the rights of the corporation has now to be decided.

With regard to the question of construction I have again considered the statutes and remain of the opinion I expressed on the interlocutory application. The first statute to be considered is the Act of 1774. It is an Act passed in pursuance of an agreement stated in an order made in an action of trespass between a freeman and a lessee of the corporation who had purported to lease him a part of the moor. The preamble of the Act recites the order in the action which includes the following terms: "It is agreed and ordered that an application shall be made for an Act of Parliament to establish for ever to the resident freemen and the resident widows of deceased freemen of the town of Newcastle aforesaid, the full right and benefit to the herbage of the Town Moor for two milch cows in the manner which has been used, subject to such restrictions and regulations as shall be adjudged necessary for the culture and improvement of the common, and shall be prescribed in the Act, and which are to be settled and agreed upon by two proper persons, one to be named by the common council, and the other by the stewards of the companies, or the major part of them . . . . and it is further ordered, that the rents to arise from the leases of parts of the Town Moor aforesaid (which may be made for the purpose of improving the common) shall be applied to the use of the poor freemen and poor widows of freemen in the manner to be prescribed by the said Act." It is further recited that "the

said agreement and order of assize and the culture and improvement of the Town Moor . . . . under proper regulations would be for the benefit of the resident freemen . . . . and resident widows of deceased freemen of the said town . . . . of Newcastle-upon-Tyne," and the preamble proceeds to state that the same cannot be effectually carried into execution without the aid of Parliament. I take that to mean that the Act is for the regulation of the culture and improvement of the moor for the benefit of the resident freemen. The Act proceeds to confirm to the resident freemen and their widows the full right and benefit to the herbage of the Town Moor for two milch cows respectively in such manner as has been used. A point has been raised whether the freemen are entitled to the whole of the herbage, or whether an inclosure made by the corporation as owners of the soil would be legal so long as a sufficiency of pasture for the cows of the freemen was left. The question is not directly important, as the pasturage is clearly insufficient to satisfy the rights of the freemen; but in my opinion the Act gives to or confirms the freemen in the exclusive right to the whole pasturage. This seems to me to be the true construction of the words in the preamble, confirmed by the subsequent provisions of both Acts. The destination of the rents reserved by the leases to be granted by the corporation and of the income of the purchase-money during interim investment also seems to me important. The Act provides for the leasing of certain parts of the moor, not exceeding 100 acres, by the corporation at the request of the stewards and wardens, but enacts that "no demise shall be made of the Cowhill and such part of the Town Moor adjoining the same as shall be necessary for holding the fairs commonly called the Cowhill Fairs, nor of another parcel of the said moor called the Race ground . . . . but the same shall be preserved for fairs and horse races as heretofore." It was suggested that these reservations justified the corporation, since the races had been discontinued, in letting sites for the defendants' roundabouts. I see no ground for this suggestion. At the date of the Act two statutory fairs were held annually at the Cowhill, and races had long been held on the racecourse, and though the right to use the moor for these purposes was

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preserved I see nothing to justify any further interference with the grazing rights of the freemen. The only right to permit the use of the moor for purposes other than those specified above is, I think, to be found in s. 8 of the Act of 1870, which authorizes agreements in relation to the Town Moor between the corporation and the committee of stewards and wardens for the purpose, among others, of "the appropriation of part or parts of the Town Moor for the space of not exceeding ten continuous days for the purposes of agricultural shows, public reviews, or other public purposes." The committee referred to was constituted by the 6th section of the same Act, which further provides that this "committee shall be by virtue of this Act authorized and required to act for and on behalf of the stewards and wardens and freemen and widows of freemen for all purposes relating to the Town Moor." It is, in my opinion, under s. 8 that the temperance festivals have been held and the accompanying shows and amusements admitted to the moor ever since 1882, and it is not until a difference of opinion as to the admission of these shows arose between the committee and the corporation that the latter ever claimed a right to act in this regard without the concurrence of the committee. In my opinion the defendants cannot justify their action under the authority of the corporation, and were guilty of acts of trespass in bringing their roundabouts and other things upon the moor. I therefore hold that the plaintiffs are entitled to the injunction which they claim.

The question of damages remains. That serious damage to the herbage of the moor was occasioned is beyond dispute; indeed in my opinion it was inevitable in view of the character of the vehicles brought upon the ground and the huge crowds which were certain to be attracted by the entertainments provided by the defendants in the holiday week. It is argued for the defendants that only nominal damages can be recovered, since the plaintiffs can shew no damage to any individual freeman and no damage common to all the freemen. The facts relied on to sustain this argument are that freemen have sold their stint tickets in many cases to persons who are not freemen, and that the latter are not represented by the plaintiffs, while if damages

were granted to the freemen who have sold their tickets they would get damages when they had suffered none, it having been proved that the injury to the herbage did not extend beyond the year May, 1913, to May, 1914, for which the stint tickets ran, with an exception which I will deal with later. It was also alleged, although I think not proved, that the stint tickets were improperly used for store cattle or cows neither in milk nor in calf which it is contended, I think rightly, are exclusively referred to in the Act. In my opinion proper precautions were taken to prevent any abuse of the freemen's rights, although no doubt grass was eaten by cows who were not in milk and ultimately proved not to be in calf. In any case this appears to me to be no concern of the defendants and to form no defence to the recovery of damages for their trespass. Further, it was argued that the value of the grazing rights to the freemen who had under the provisions of the Act sold their stint tickets was to be measured by the amount which they received for them, and the defendants' witnesses on this basis assessed the damages at a trifling sum of some 10*l.* In my opinion they estimated the damage on a wrong principle. The committee represent the freemen for all purposes relating to the Town Moor, and it is their duty to protect and improve the moor to the best of their ability. I think they are entitled to recover damages for injury done to the moor and that the measure of damages is the amount of injury done. The exception already mentioned arises in this way. The year 1912 was excessively wet and extraordinary damage was done to the moor at the time of the festival. A large sum of money was expended upon levelling, covering with soil, sowing and rolling the parts of the moor most injured. In part this expenditure was rendered futile by the damage done at the time of the festival of 1913, and the recovery of the injured parts retarded by a year. This would involve damage to all the freemen for the year 1914-1915, and consequently this head of damage would not be covered by the argument above referred to. I have taken damage under this head into account in considering the amount of damages, which I estimate in the whole at the sum of 214*l.*, for which I give judgment, together with the costs of the action. The injunction will follow the prayer in the

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statement of claim with the addition of the words "without the consent of the plaintiffs."

Solicitor for plaintiffs: *J. H. Pitchforth, for Arnott, Swan & Walker, Newcastle-upon-Tyne.*

Solicitors for defendants: *Collyer-Bristow, Curtis, Booth, Birks, & Langley, for A. M. Oliver, Newcastle-upon-Tyne.*

H. L. F.

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FOWKE *v.* BERINGTON.

[1912 F. 1152.]

Feb. 5, 6, 11, 12, 13, 25, 26, 27; *March* 3, 4, 5, 6; *May* 11.

Parish Church — Conventual Church — Appropriation — Rectory — Perpetual Curate — One of Two Churchwardens — Right to sue — Suppression of Priory — Grant from Crown — Sale of Bells — Long Possession — Evidence — Historical Work — "Habington's Survey of Worcestershire" — Evidence of Particular Fact.

This action was brought by the perpetual curate and one of the churchwardens of the parish church of Little Malvern against the lord of the manor to recover possession of certain ruins which were formerly choir aisles and transepts of the church but had been in the possession of the lord of the manor since the dissolution of the lesser monasteries in 1535. The parish church, as it was now, and had been for generations, used, consisted of the tower and choir only of a larger church, which had been at some time walled off from the ruined aisles and transepts. The question was whether the original church had been a parish church appropriated to the priory, or a conventual church in part of which the parishioners had been allowed to worship. The site of the priory which included the church if it was conventual had been granted by the Crown to the defendants' predecessors in title, and they had been in possession of the ruins ever since.

A preliminary objection was taken that the plaintiffs had no right to sue:—

Held, that one of two churchwardens cannot sue alone, and as against the churchwarden the objection was good:

That a perpetual curate has sufficient possession of everything which forms part of the parish church to enable him to sue for possession and for rights over the church, for the spiritual purposes of his cure, and that as against him the objection failed.

Habington's Survey of Worcestershire, a work written in the seventeenth century but only recently published, and regarded as an historical authority, was tendered as evidence of a particular fact, namely, the physical condition of the church when the author saw it, but rejected.

Attorney-General v. *Horner* (No. 2) [1913] 2 Ch. 140 applied.

Held, also, upon the evidence and the inference to be drawn from ancient documents and from the long possession of the defendants, that the church was originally a conventual church, and that the parochial rights therein were confined to the parts actually used as a parish church since the dissolution.

Semble, a rectory may be attached to a part of a church; and the fact that the "Rectory of Little Malvern" is entered in the Returns of the Court of Augmentations among the spiritualities of the suppressed priory does not prove that the whole of the church of Little Malvern was a parish church.

The fact that the officers of the Court of Augmentations sold the bells of the church after the dissolution is strong evidence that the whole building was not a parish church.

THE plaintiffs in this action were the incumbent (perpetual curate) and one of the churchwardens of the parish church of St. Giles, Little Malvern, in the county of Worcester. The statement of claim alleged that the church of St. Giles was an ancient building dating from the twelfth century, that it was rebuilt in the fifteenth century by the then Bishop of Worcester, and that at the date of the dissolution of the monasteries it was appropriated to the Priory of Little Malvern, which was dissolved in the year 1535. The church as rebuilt in the fifteenth century consisted of a choir with north and south choir aisles and transepts, a tower and nave, all on consecrated ground. The nave had entirely disappeared, the north and south choir aisles and transepts had become very ruinous, and the choir alone was, and had been for many years, used for divine service. The choir had at some unknown but early date been walled off from the ruins. The present incumbent had made plans for the restoration of the parish church, including parts of the ruined choir aisles and transepts. For this purpose the plaintiffs claimed a declaration that the said choir aisles and transepts and the ground formerly occupied by the same formed part of the parish church; and an injunction restraining the defendants from trespassing thereon and from interfering with the restoration or repair, use, and enjoyment thereof as part of the parish church.

The defendants were two trustees of a settlement one of whom, Berington, was tenant for life of the manor of Little Malvern. They alleged that the church of St. Giles was not originally the parish church of Little Malvern, but a conventual church belonging

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to and forming part of the Priory of Little Malvern which had passed to the Crown on the dissolution of the monasteries and been granted by the Crown to their predecessors in title and had ever since remained in the possession of themselves or their predecessors in title. They admitted at the Bar, though not in the pleadings, that the choir of the old church had become by user the parish church, but denied that the said transepts and aisles had ever been part of such parish church. They pleaded the Statutes of Limitation and that the claim of the plaintiffs was barred by acquiescence and delay.

They also pleaded that Fowke being only a perpetual curate who had no title to the freehold of the church, and the other plaintiff being only one of two churchwardens, they could not maintain the action.

The plaintiffs also claimed a piece of ground adjoining the ruins as having formed part of the ancient churchyard, and having been wrongfully enclosed by the defendants; but this point was decided against the plaintiffs on the evidence.

Hon. Frank Russell, K.C., and *F. H. L. Errington*, for the plaintiffs. There is no question that there has been a parish church in Little Malvern since the dissolution of the monasteries, and that the building now in use forms part of a much earlier building in which before the dissolution the monks of the Priory of Little Malvern and the parishioners both had some rights. The plaintiffs claim that the older building was a parish church appropriated to the priory, which was rector thereof; the defendants contend that it was a conventual church, in part of which the parishioners had been allowed to hold services. The church appears to have been founded by Aldwin, a Benedictine monk, who died in 1140. There is nothing inconsistent in a monk founding a parish church. It is referred to in a charter of Bishop Simon of Worcester on the church of St. Giles "which has been founded in my fee and enriched with a religious order," which suggests that the church was there before the order. By the same document the bishop united the Priory of Little Malvern to that of Worcester.

Between the date of the foundation and 1480 there are one or

two wills of laymen directing that they should be buried in Little Malvern church, which points to a parish church. In 1480 Bishop Alcock of Worcester compelled the prior of Little Malvern to resign and suspended the monks for misconduct, sending them to other priories of their order for discipline. He rebuilt the church, or more probably the central tower and the part of the church to the east of it, and in 1482 in a letter to the monks permitting their return he wrote "I have builded your church." (1) That expression will be relied on by the defendants, but it would be quite correct if the church was appropriated to the priory.

In 1513 Bishop Sylvester of Worcester held a visitation in the church of Little Malvern for the deanery of Powyck. Such a visitation could only be held in a parish church.

In the Valor Ecclesiasticus (a valuation made by Henry VIII. in 1534-35 to ascertain the value of the first fruits then granted to him) the Priory of Little Malvern is valued, and among its "spiritualities" is set down "Rectory of Little Malvern worth in tithes and oblations one year with another"—then follow items amounting together to 82*s.* 4*d.* That shews conclusively that the church was appropriated to the priory and the priory was rector of the parish church. It was only in that capacity that they could be entitled to tithe. A conventual church could not have any right to tithe. A rectory implies the existence of a parish church, glebe, tithe and oblations. There need not be more glebe than the site of the church and churchyard, but there must be some land; if tithe only is proved there is no rectory: *Holden* v. *Smallbrooke* (2); *Berry* v. *Wheeler* (3); Degge's Parson's Counsellor, 7th ed. p. 241; Comyns' Digest vol. 3, p. 541 (tit. Eccl. Persons).

In the accounts of the ministers of Henry VIII. and of the Court of Augmentations, shortly after the dissolution, of the value of the dissolved Priory of Little Malvern, and in a valuation made for the purpose of a grant to Russell, the defendants' predecessor in title of the priory and its possessions, there is no mention of the

(1) Worcester Episcopal Registers, Bishop Alcock, fo. 111; Nash, Hist. of Worcestershire, ii. 153; more fully quoted in the judgment, p. 341, post.

(2) (1667) Vaugh. 187, 197.

(3) (1662) 1 Sid. 91.

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church, but only of "the priory with orchards gardens stables and other houses and 82 acres of pasture," but there is charged as an outgoing "5*l.* stipend of the curate administering the sacraments and sacramentals there." That is conclusive that there was a parish church. It was the rule in an appropriated church, where there was no endowed vicar, that a stipendiary curate should be paid by the monastery. It is inconceivable that Henry VIII. started this payment if there had previously been only a chaplain serving the priory. This payment of 5*l.* was charged upon the property granted to Russell and formed the only endowment of the parish church until in modern times it was increased to 40*l.* by Queen Anne's Bounty. This increase could not have been given except to a parish church.

Immediately after the dissolution of the monasteries we find churchwardens and the full equipment of a parish church. The only natural inference is that there was always a parish church and that it was the same church which was rebuilt by Bishop Simon. There is a petition by one of the Russells to the Crown, presented immediately after the dissolution, asking for the return of the bells, which had been taken away, on the ground that they had always served the parish church.

The plaintiffs tendered in evidence of the physical condition of the church in the early part of the seventeenth century a work known as Habington's Survey of Worcestershire. This work had only been published recently by the Worcester Historical Society, but it had existed in MS. since the time of its author and was considered a work of high authority.

Cave, K.C., objected to its admission.

Hon. Frank Russell, K.C., and *F. H. L. Errington*, in favour of its admission. Habington died in 1647; his Survey was written from his personal observation, and it is admissible as evidence of reputation. The rights of a particular church are of a sufficiently public character to make evidence of reputation admissible: *Carr* v. *Mostyn*. (1)

[ASTBURY J. You are not putting it in as evidence of

(1) (1850) 5 Ex. 69, 87.

reputation, e.g., that it was a reputed parish church, but as evidence of its physical condition at the time. That is evidence of a particular fact, not reputation.]

In *Read* v. *Bishop of Lincoln* (1) pictures, engravings, and other documents were admitted to shew the ancient practice as to the position of the celebrant and the holy table, and the Privy Council held that historical documents might be referred to to ascertain facts of a public nature.

[Astbury J. That was a question of ritual which affected all churches. This evidence only goes to the physical condition of this particular building.]

In *Duke of Norfolk* v. *Arbuthnot* (2) an old print of the Fitzalan chapel was admitted.

There is another ground on which this evidence is admissible. It is an historical fact that no living witness can depose to, and it is established by an authentic record of the period. Habington's Survey, which has been published by the Worcester Historical Society, is freely quoted and relied on by all historical experts. It is therefore as admissible as Brunel's reports in *East London Ry. Co.* v. *Thames Conservators.* (3)

Cave, K.C., E. W. Hansell, and *J. Arthur Price,* for the defendants. The evidence is obviously inadmissible. It is not evidence of reputation at all. It is merely a statement of a particular fact, namely, the physical condition of the church when Habington saw it. That is clearly not admissible: *Cooke* v. *Banks* (4); Taylor on Evidence, 10th ed. p. 438. General histories are admissible to prove a matter relating to the kingdom at large, not to prove a private right: *Stainer* v. *Burgesses of Droitwich* (5); *Evans* v. *Getting.* (6) The present case is only of interest to the particular parish.

A description by map is clearly inadmissible—*Attorney-General* v. *Horner* (No. 2) (7)—and there is not a word in the judgments which is not equally applicable to a description by a written document or book. In *Carr* v. *Mostyn* (8) the statement of the

(1) [1891] P. 9, 49, 51, 85, 86; [1892] A. C. 644, 652.
(2) (1879) 4 C. P. D. 290, 306.
(3) (1904) 90 L. T. 347.
(4) (1826) 2 C. & P. 478.
(5) (1695) 1 Salk. 281.
(6) (1834) 6 C. & P. 586.
(7) [1913] 2 Ch. 140, 153.
(8) 5 Ex. 69, 87.

ASTBURY J. deceased incumbent must have been treated either as a statement of reputation or as an admission. In *East London Ry. Co.* v. *Thames Conservators* (1) Brunel's reports were made to the plaintiffs' predecessors in pursuance of his special duty as constructor of the tunnel.

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Hon. Frank Russell, K.C., in reply. The evidence in *Attorney-General* v. *Horner* (No. 2) (2) was rejected with great regret, and if *Read* v. *Bishop of Lincoln* (3) had been cited, it would probably have been admitted.

ASTBURY J. This is a preliminary question whether a passage from Habington's Survey of Worcestershire written in the early part of the seventeenth century can be put in evidence. The plaintiffs admit that the passage is a description of the church by Habington founded on what he himself saw, and not founded on what he heard by way of reputation in the district. The authorities are perhaps difficult to reconcile.

In *Carr* v. *Mostyn* (4) Parke B. in dealing with a case in which the question was whether the alleged chapelry of St. Helen's was a legal parochial chapelry said: "The first piece of evidence disputed, was that of a statement by one of the witnesses, that he had heard from a former incumbent of St. Helen's, that the people of four townships, and of one in the parish of Winwick, came to the chapel. The rights of this chapel are sufficiently of a public nature, to make reputation admissible; and this appears to us to fall within this description." In the opinion of Parke B., therefore, the rights of a particular church were sufficiently of a public nature to make evidence of reputation admissible.

In *Evans* v. *Getting* (5) the boundary between two parishes was in question in an action for disturbance of common. The plaintiff tendered Nicholl's History of Brecknockshire to shew the county boundary, which was admittedly conterminous with the parish boundary at the spot. Alderson B. said: "The writer of that history probably had the same interest in enlarging the

(1) 90 L. T. 347.
(2) [1913] 2 Ch. 140.
(3) [1892] A. C. 644.
(4) 5 Ex. 69, 87.
(5) 6 C. & P. 586.

boundaries of the county as any other inhabitant of it. It is not like a general history of Wales. I shall not receive it." A note to the report refers to Buller's Nisi Prius, p. 248, where it is stated that "a general history may be admitted to prove a matter relating to the kingdom at large, but cannot be received as proof of a private right or particular custom." It also refers to *Stainer* v. *Burgesses of Droitwich* (1), where the question was "whether, by the custom of Droitwich, salt pits could be sunk in any part of the town or in a certain place only; and upon the trial at bar, Camden's Britannia was offered in evidence, and refused; for the Court held that a general history might be given in evidence to prove a matter relating to the kingdom in general, because the nature of the thing requires it, but not to prove a particular right or custom."

The plaintiffs relied strongly on the decision of the Privy Council in *Read* v. *Bishop of Lincoln*. (2) In that case the appellants objected to some of the evidence admitted by the archbishop, but Lord Halsbury said (3): "It has been urged that upon such subjects as the practice of the Primitive Church, the ritual of the Eastern and Western Churches, the position of the Lord's table, the position of the celebrant at the table, and like questions, which are ex hypothesi beyond the reach of living memory, the archbishop has consulted ancient authors, historical and theological works, pictures, engravings, and a variety of documents, of which undoubtedly any careful and competent historian would avail himself, but which it is argued cannot legitimately be made use of in a Court of justice, and upon which it is said no judge is justified in placing any reliance in forming his judgment. Where the objection is of so general a character, it is impossible to do more than apply to it a general treatment. The first observation that arises is, that if our law were to exclude all such historical investigation as is pointed to by the objection, and questions of ritual and ecclesiastical practice could only be investigated by the light of the words of an Act of Parliament some centuries old, and by the testimony of living witnesses, it would disclose a

(1) 1 Salk. 281. (2) [1892] A. C. 644.
(3) [1892] A. C. 652.

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very unreasonable and unsatisfactory state of the law. Who can doubt that contemporaneous usage would be of incalculable value in forming a judgment on such subjects as are indicated above? And if no historical investigation can be permitted as to what was the contemporaneous usage, one source of light upon doubtful questions would be excluded." After referring to the fact that similar authorities were admitted without objection in *Ridsdale* v. *Clifton* (1), "and this not upon questions of doctrine or opinion, but as leading to inferences of fact of what was usual at the time of the writers referred to," Lord Halsbury continued: "But their Lordships are of opinion that the objection is founded upon an erroneous view of the law. Where it is important to ascertain ancient facts of a public nature, the law does permit historical works to be referred to."

In *Duke of Norfolk* v. *Arbuthnot* (2) Lord Coleridge C.J. referring to the Fitzalan chapel says: "A hundred years ago, as a print of that date shews, there was a rich carved roof which, whether it was removed or fell down, at any rate no longer exists." But there is nothing in the report to shew where the print came from, or whether any objection to its admissibility was taken.

Apart from reputation this evidence is tendered as an authentic record of a historical fact that no living witness can depose to, reliance being placed on the decision of Farwell J. in *East London Ry. Co.* v. *Thames Conservators.* (3) In that case the plaintiffs objected to the conservators dredging the river bed over their tunnel owing to the alleged nature of the soil. Their evidence as to this rested almost entirely on the reports of Brunel, the constructor of the tunnel, and it was impossible to verify the facts therein stated without investigations involving danger to the tunnel. Farwell J. said: "I have had called before me two very eminent experts to prove the likelihood of danger by the proposed dredging who are absolutely unbiassed and impartial in the matter; but whose opinion is based on statements made by the original constructor of the tunnel. It is not immaterial, therefore, to consider one or two matters of history with respect to Sir Isambard Brunel's construction of the

(1) (1877) 2 P. D. 276. (2) 4 C. P. D. 290, 306.
(3) 90 L. T. 347.

tunnel and his memoranda and records of what took place. It has been submitted that these records are not proper evidence; but I am of opinion that I am entitled to regard them in the same way that I regard any other fact of history which did not take place within living memory, if it is established by authentic records. Inasmuch as all the engineers whom I have seen agree that these records are accessible to engineers and are accepted by them as absolutely accurate, it appears to me that the Court would be very shortsighted to decline to take advantage of whatever benefit may be obtained from the knowledge of the historical facts so authenticated."

These are the grounds on which the plaintiffs say the evidence is admissible.

The defendants on the other hand say that it is not a statement of reputation at all, but merely a statement of a particular fact by a particular person who was under no duty whatever to make it, and that it is not admissible.

They rely on *Cooke* v. *Banks* (1), *Stainer* v. *Burgesses of Droitwich* (2), *Evans* v. *Getting* (3), and more particularly on the judgments of the Court of Appeal in *Attorney-General* v. *Horner* (No. 2.) (4) That was an action by the Attorney-General at the relation of the London Corporation against the lessee of the Spitalfields Market. One of the questions was as to the user and obstruction of the streets adjoining the market. In order to shew the physical characteristics of the locality at the time of the charter of 1682 three maps were tendered, namely, (*a*) an actual survey made in 1677 by John Ogilby and William Morgan and dedicated to the Lord Mayor by William Morgan, His Majesty's cosmographer; (*b*) a map published in 1681-82 described as a map of London actually surveyed by Sir William Morgan; (*c*) Gascoigne's Map of Stepney, 1703. Cozens-Hardy M.R. said (5): "Overborne by the weight of authority, and contrary to my own individual opinion as to what would be reasonable and just, I feel bound to reject these maps. The question which arises before us at this stage of the

(1) 2 C. & P. 478.
(2) 1 Salk. 281.
(3) 6 C. & P. 586.
(4) [1913] 2 Ch. 140, 152.
(5) [1913] 2 Ch. 153.

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argument is, what was the condition of this property at the date of the charter of Charles II., 1682? One would have thought, that being a matter as to which living evidence cannot be given, the Court might look at any contemporary maps and admit them for what they were worth in order to inform itself of that which after all is a matter of history. The question is, on this branch of the case, whether there were public highways around the Spitalfields Market. I can conceive that there might be some book written in the reign of Charles II. or James II. describing the property, and saying, as part of the narrative, what the streets were around it; and it does seem very strange that in a case where reputation is admitted a book of that kind would not be admissible. We have no book, except so far as one of the books attached to the map can be called a book, but we have maps the date of which is fixed, one just before the grant of the charter, one after, and another in 1703. We have no information on the point as to whether the man who made any one of these maps had any special knowledge of the locality, or that he had any special duty to discharge in making these maps. He seems to have been a man who was publishing maps as a private adventurer. On one of the maps, if not more than one, there is the price at which any one might buy it. The decisions of this Court to which our attention has been called, particularly the cases of *Pipe* v. *Fulcher* (1) and *Hammond* v. *Bradstreet* (2), seem to me to lay down a rule which is absolutely binding on us, that in a matter of this kind, where the issue is public highway or not, you cannot produce a map as equivalent to a statement by an individual of a particular fact relating to the property when it does not purport to be a statement of reputation."

In the present case there is a statement by Habington of what he saw, but the statement was not made in the discharge of any special duty, and I am bound to hold on this authority that the statement being merely a statement by an individual of a particular fact and not purporting to be a statement of reputation is not admissible.

Cozens-Hardy M.R. concludes his judgment as follows (3):

(1) (1858) 1 E. & E. 111. (2) (1854) 10 Ex. 390.
(3) [1913] 2 Ch. 154.

"Speaking individually, with great regret that we are not allowed to get such light, it may be but little, but such light as is possible, in dealing with a matter more than two hundred years old, I am bound to say, according to the authorities, that these plans are not admissible."

Buckley L.J., with very great regret, felt himself constrained by authority to agree.

Hamilton L.J. says (1): "I think that the rule is as stated by Wightman J. in *Pipe* v. *Fulcher* (2), that although hearsay evidence of reputation is admissible to prove a public right of highway, you cannot by hearsay evidence prove the preliminary fact that there is a way"; and later on he says (3): "Generally I quite agree that I should desire to know the historical evidence about Spitalfields, which for every purpose, except that of deciding the issue as to property between private persons, nobody would think of excluding; but I yield to authority on the law of evidence without reluctance, because I am satisfied that in the main the English rules of evidence are just, and I am satisfied also that there is no portion of the English law which ought more rigidly to be upheld."

In *East London Ry. Co.* v. *Thames Conservators* (4) Brunel's reports were made in performance of a special duty and the tunnel was made under his direction.

I must reject this evidence.

G. R. A.

Cave, K.C., E. W. Hansell, and *J. Arthur Price,* for the defendants, took the preliminary objection that the plaintiffs had no right to sue. The possession of a church is in the minister and churchwardens: *Jarratt* v. *Steele.* (5) A perpetual curate has merely a right of possession for spiritual purposes and can maintain trespass if and so far only as that particular right is interfered with: *Jones* v. *Ellis* (6); *Griffin* v. *Dighton* (7); *Greenslade* v. *Darby.* (8) But these ruins are clearly not wanted for the performance of spiritual offices, so that the perpetual

(1) [1913] 2 Ch. 155.
(2) 1 E. & E. 111.
(3) [1913] 2 Ch. 156.
(4) 90 L. T. 347.
(5) (1820) 3 Phillim. 167, 169.
(6) (1828) 2 Y. & J. 265, 272, 274.
(7) (1864) 5 B. & S. 93, 104, 114.
(8) (1868) L. R. 3 Q. B. 421, 428.

ASTBURY J. curate has no right to sue. This objection is not cured by the joinder of one churchwarden, as both must sue: *Fry* v. *Treasure* (1); *Ritchings* v. *Cordingley.* (2)

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On the case generally. It is not enough for the plaintiffs to shew that there was a parish church in Little Malvern, or even that it was on the site of the present church. They must shew that the ruins claimed formed part of that parish church, and the burden of proof is on them. There is no evidence that the ruined parts formed part of the parish church, and if they had the parish would have been liable to keep them in repair. The fact that the parish did not repair them is almost conclusive evidence that they were not part of a parish church: *Duke of Norfolk* v. *Arbuthnot.* (3)

There is ample proof that an ecclesiastical building may belong to different owners and be partly conventual and partly parochial, or in the hands of private owners—*Churton* v. *Frewen* (4); *Chapman* v. *Jones* (5); *Eliot* v. *Bristol Corporation* (6)—and that parishioners may acquire rights to perform services in part of a conventual church: *Buzard's Case* (7); *Duke of Norfolk* v. *Arbuthnot* (3); Coke's 2nd Inst. p. 489.

In the present case Bishop Alcock's church was obviously too large for this tiny parish. The evidence shews that it was not originally a parish church, and that there were no parochial rights before the dissolution of the monasteries. The plaintiffs say it was originally a parish church appropriated to the priory. But there is no trace of the appointment of any secular person as vicar, or the institution of any incumbent before the dissolution, or of any endowment, which one would expect to find on such an appropriation—Burn's Ecclesiastical Law, 9th ed. vol. i. p. 76b—and there is no mention of churchwardens before the dissolution. If it had been a parish church the Bishop of Worcester could not have made it a cell of Worcester, as there can only be union between things of the same nature: Lyndwood's Provinciale, 159b; Wharton's Anglia Sacra, vol. i. p. 476. Neither

(1) (1865) 2 Moo. P. C. (N.S.) 539.
(2) (1868) L. R. 3 A. & E. 113.
(3) 4 C. P. D. 290; (1880) 5 C. P. D. 390, 409.
(4) (1866) L. R. 2 Eq. 634, 651.
(5) (1869) L. R. 4 Ex. 273.
(6) (1895) 72 L. T. 752.
(7) (1614) 2 Roll. Abr. 289.

would the prior have had jurisdiction over it, e.g. by authorizing the appointment of certain secular clerks to pray at the altar of the Holy Cross.

The onus is not on the defendants to shew what the real state of things was. But we submit that the true inference from the documents is that the whole church was conventual, but the parishioners were allowed to have some services in the nave. After the dissolution the conventual part of the church passed to the King and by grant from him to private owners. The nave having become ruinous, the parishioners may subsequently have acquired some rights in the other part of the church, but this could only be by user, and could not have applied to the transepts and aisles which were never used. In this case all the repairs which were done at all were done by the lord of the manor. He exercised rights of ownership, such as cutting the ivy, and the ruins have been all along in his possession and enclosed in his garden, and the case of *Duke of Norfolk* v. *Arbuthnot* (1) applies.

The documents are all against the theory that this was originally a parish church. We have already mentioned the grant of Bishop Simon uniting the "church," not merely the priory, to the church of Worcester, which he could not have done if it were a parish church.

When Bishop Alcock suspended the priory and banished the monks, there is no mention of a chaplain and no provision for services for parishioners. In his letter giving the monks leave to return he says "I have búilded your church"; he could not so describe a parish church, and it is inconceivable that the bishop should rebuild a church which the parishioners were liable to repair. That liability was enforceable at law: Burn's Ecclesiastical Law, 9th ed. vol. i. p. 356.

In 1498, the See of Worcester being vacant, a visitation for the deanery of Powyck was held by the commissary of Cardinal Morton, Archbishop of Canterbury, and the account of the visitation, which is very carefully drawn up, states that the visitation was held in the conventual church of Lesser Malvern. This account being drawn up by the official of the archbishop is more

(1) 4 C. P. D. 290; 5 C. P. D. 390.

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likely to be correct than the statement relied on by the plaintiffs that the visitation of Bishop Sylvester was held in the parish church of Little Malvern.

The plaintiffs made a great point of the use of the word "rectory" in the Valor Ecclesiasticus, but the word is not conclusive. It was used at that time to mean only the ownership of tithe: *Anon.* (1)

It was not then the universal rule that tithes could only belong to a parish church, they could belong to a monastery: Gregorian Decretals, bk. iii. tit. 30, cap. 30.

[*Hon. Frank Russell, K.C.* That passage refers to the state of things in a French diocese. It is no authority for England.]

Tithe in England prior to the Reformation was governed by the general canon law and there were appeals to the Pope from the English Church Courts in tithe cases.

Even if a rectory implies the existence of a parish church, it does not follow that the parish church included the whole building. A rectory may be attached to a room in a house used as a chapel: *Boulton* v. *Richards.* (2)

It is said that there is no mention of a church in the Valor Ecclesiasticus, or in the grant to Russell, but the church formed part of the priory buildings and was included in the grant of the site of the priory. That it passed is plain, for immediately after the dissolution the officers of the Court of Augmentations sold the bells, and charged in their accounts the cost of pulling down the tower to get at them. That is conclusive that the tower was not part of the parish church.

It appears from the Augmentations accounts that for a year after the dissolution the prior continued in residence and was allowed to receive the profits of the priory, which he expended in performing the sacraments and sacramentals for parishioners, and in hospitality. When he went we hear for the first time of a stipend for the chaplain and of churchwardens. It was natural and proper that the Crown should provide for such services as the parishioners had been allowed to attend. If the church had been a parish church before there would have been some record of churchwardens, for they began to be prominent in the fifteenth

(1) (1577) 2 Leon. 10. (2) (1819) 6 Price, 483.

century: Pollock and Maitland H. E. L., 2nd ed. vol. i. p. 614; Bishop Hobhouse's Churchwardens' Returns, published by the Somersetshire Record Society; though they did not make presentments till shortly before the Reformation. Every parish in England was from early times bound to have churchwardens. A custom to have no churchwardens is bad: *Rex* v. *Inhabitants of Wix.* (1)

The numerous presentments by churchwardens in the seventeenth century "that our church is in good repair" are wholly inconsistent with the notion that their church included the ruined aisles and transepts. They must refer to the church as it now is with the ruins walled off. This walling off was probably done in the reign of Philip and Mary, because it appears from the evidence of the architectural experts that the original rood screen was moved eastwards at the same time, and after that date it would not have been moved at all. Rood screens were regarded as superstitious and removed under Elizabeth's Inquisitions of 1559.

The defendants also contended that though consecration would prevent them or any one else from using the land for secular purposes, it did not prevent the Statutes of Limitation running against the plaintiffs so as to bar their action for possession after sixty years, but the view taken by the judge made it unnecessary to decide this point.

Hon. Frank Russell, K.C., in reply. As to the right to sue, the authorities are quite clear that the incumbent, even if he is only a perpetual curate, has sufficient possession of the church to maintain trespass: *Jones* v. *Ellis* (2); *Griffin* v. *Dighton* (3); *Batten* v. *Gedye* (4); *Greenslade* v. *Darby.* (5) In the last case it was held that a perpetual curate had possession of the churchyard though he was not necessarily entitled to the herbage. A perpetual curate has not the freehold, nor has the vicar, but it has been frequently decided that a vicar can sue the lay rector. If it were otherwise no one could sue the lay rector except himself.

(1) (1831) 2 B. & Ad. 197.
(2) 2 Y. & J. 265.
(3) 5 B. & S. 93.
(4) (1889) 41 Ch. D. 507.
(5) L. R. 3 Q. B. 421.

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The case of *Attorney-General* v. *Horner* (No. 2)(1) shews that the Court will consider probability in presuming a lost grant or other legal origin from long possession.

The normal origin of a perpetual curacy is from the appropriation of a parish church to a monastery. The Court will presume that in this case matters followed the normal course and not that the curacy originated in a special grant from the King at the dissolution, an origin which is unusual if not unknown.

Cur. adv. vult.

May 11. ASTBURY J. This is an action brought by Mr. Fowke, the perpetual curate, and Elspeth Margaret Laughton, one of the churchwardens of the present parish church of St. Giles, Little Malvern, for a declaration that certain ruins form part of the parish church, and for an injunction to restrain the defendants from trespassing on and obstructing the restoration and enjoyment of the same.

The present church, to which much historical interest attaches, is part of an ancient church, built or rebuilt in the fifteenth century as part of or adjoining a still earlier church believed to have been built in the twelfth century, and consists only of the choir and tower of the later church. The ruins in question lie outside the north and south walls of the choir, and are the remains of north and south aisles and transepts, the arches between them and the choir having many generations ago been walled up so as to exclude the ruins from the church as since used. In the east wall of the church there exist two walled up openings, north and south of the east window, which it is suggested formerly led into a sacristy or Lady chapel, but no further evidence of its existence or use has been given, and with the exception of the remains of what are said to have been the buttresses or part of the side walls thereof, no ruins of such sacristy or chapel now remain.

There exist in the ruins remains of the foot plates of two altars, one in the north transept and the other in the south aisle, also the remains of a flat tomb in the north-west corner of the north transept. On the western wall of the tower there

(1) [1913] 2 Ch. 140, 191.

still remains a faint outline or mark of the roof of the nave of the earlier twelfth century church, and there are traces of cloisters having existed at the south-west angle of the tower, and of two doors opening from them into the old nave and south transept respectively. In the walled up arch on the north side of the church there is a window, believed to have been the east window of the ruined north aisle, with some fifteenth century glass still left in its upper part.

The defendant Berington, whom I shall hereafter refer to as the defendant, claims to be rightfully in possession of the said ruins under the circumstances hereafter mentioned.

A preliminary objection has been raised by the defendant as to the plaintiffs' right to sue, which succeeds in my judgment in the case of the plaintiff Elspeth Margaret Laughton. She is one of two churchwardens and as such cannot sue alone: see *Fry* v. *Treasure* (1) and *Ritchings* v. *Cordingley*. (2)

The other plaintiff, Mr. Fowke, whom I will hereafter refer to as the plaintiff, is a perpetual curate, and as such has no seisin of anything appertaining to the church, though, being licensed to perform divine service therein, he has sufficient possession to sue for interference with the services. By the statute 1 Geo. 1, c. 10, perpetual curacies became benefices, and the holders by statute 31 & 32 Vict. c. 117 became entitled to be called vicars. A vicar has sufficient possession of the church to maintain trespass—*Jones* v. *Ellis* (3)—even as against the lay rector: *Griffin* v. *Dighton*. (4) In *Greenslade* v. *Darby* (5) it was decided that a perpetual curate has possession for spiritual purposes of the church and churchyard, and although the plaintiff would have no power to interfere with the fabric of the church by breaking through its north and south walls for the purpose of bringing the ruins, as it were, into the church without a faculty, he has, I think, sufficient possession of the ruins claimed, if they in fact form part of the parish church, to enable him to sue for possession of and rights over them, for the spiritual purposes of his cure: otherwise he could not place himself in

(1) 2 Moo. P. C. (N.S.) 539, 553.
(2) L. R. 3 A. & E. 113.
(3) 2 Y. & J. 265.
(4) 5 B. & S. 93, 102.
(5) L. R. 3 Q. B. 421.

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a position to apply for and obtain a faculty in respect of them, if such a course were desirable, and with regard to him the preliminary objection fails.

The original church of which the present church of St. Giles is a portion was associated with the Priory of Little Malvern founded in the twelfth century. It is not disputed that since the early part of the seventeenth century the present church has been a parish church; and the question in this action, as far as the ruins are concerned, largely turns upon whether they formed part of one whole and entire parish church from the earliest times, or whether the fifteenth century church, or that portion of it of which the ruins formed part, was "conventual" and not "parochial," and passed, "deconsecrated," on the dissolution of the monastery to the subsequent grantee of its property from the Crown, from whom the defendant and his trustees claim. The defendant, who and whose ancestors have throughout been Catholics, is the equitable tenant for life in possession of the manor and estate of Little Malvern, formerly part of the possessions of the priory, and as such is the lay rector and owner of the advowson of the church and living. His house, Little Malvern Court, which was originally that of the prior, almost adjoins the south-west side of the church; the south ruins are in his garden, and the north ruins lie in his meadow, which adjoins the church on the north and east.

At an inquisition taken at Worcester on April 7, 1608, on the death of Sir Henry Russell, a predecessor in title of the defendant, the jury found "that the said Henry Russell, long before his death, was seised in his demesne as of fee, of and in the site, ambit and precinct of the lately dissolved Priory of Little Malvern in the county aforesaid, with all its rights, members and appurtenances, and of all and singular the houses etc." and of the pastures and meadows therein mentioned. "And the jury further say that he was seised in his demesne as of fee of and in the manor of Little Malvern in the county aforesaid, with all its rights, members and appurtenances, and of and in divers lands, tenements and hereditaments." . . . . "And also of all and singular the tithes of sheaves, grain, hay and all other tithes whatsoever, and personal annual tithes, as well greater as lesser,

growing, coming or renewing within the parish of Little Malvern aforesaid." . . . . "The jury further say that the 'curate' for the time being celebrating divine service in the parish church of Little Malvern, in the county aforesaid, for a long time has been accustomed to have and receive, and at the time of this inquisition has and receives, and ought to have and receive, for ever, a certain annual rent of five pounds issuing from the manor of Little Malvern aforesaid." . . . . "The jury say that the aforesaid site, ambit, etc. was held by Henry Russell of the lord the King in chief by the service of a fortieth part of one knight's fee" and so on.

At a presentment made by a jury in 1651 sworn to inquire of church livings in the county of Worcester, they found "that in Little Malverne is a Church w^{ch} wee conceive to be a donative and there hath allwayes beene five pounds yearely payed to the Minister and that Mr. Haywood Clerke doth officiate there payed by Robert Russell Lord of the Mano^{r} of Malverne."

In Godolphin's Repertorium Canonicum, at p. 262, it is stated: "A Parochial Church may be a Donative, and exempt from the Ordinaries Jurisdiction, and the Incumbent may resign to the Patron and not to the Ordinary; nor may the Ordinary visit, but the Patron by Commissioners to be appointed by him." And in the first volume of Phillimore's Eccl. Law, 2nd ed. pp. 252, 253, it is stated: "A donative is a spiritual preferment, be it church, chapel, or vicarage, which is in the free gift or collation of the patron, without making any presentation to the bishop; and without admission, institution, or induction by any mandate from the bishop or other; but the donee may, by the patron or by any other authorized by the patron, be put into possession. And this right in the donor (together with the exemption of the church from ecclesiastical jurisdiction) seems to have come from the consent of the bishop in some particular cases; as when the lord of a manor in a great parish, having his tenants about him at a remote distance from the parish church, did offer to build and endow a church there, provided that it should belong entirely to him and his family, to put in such persons as they should think fit, if they were in holy orders. It is very possible that the bishops at that time, to encourage such a work, might permit

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From 1662 to 1790 a large number of churchwardens' presentments at visitations of the Bishops of Worcester have been proved, of which the following are important, and may be taken as examples.

In September, 1662, the churchwardens presented as follows: "As concerning our church it is out of repaire at present in regard of the late warres, which did so impoverish the people that they were not able to repayre it, it being known to be a very small and poore place; but we hope in some time to have it put in order with other things necessary." "The churchyard is not enclosed. We have no parsonage-house nor glebelands. There is only a stipend of 5 pounds a yeare belonging to the parson or minister that doth officiate." And: "We have no school or hospital."

In 1670 the churchwardens presented: "Our church is something out of repayre, but we have made a booke to gather money for it, and are resolved to putt him in repayre as soone as possible we may."

In 1674 they presented: "Our church and chancell fabricke in very good and sufficient order and repaire, well-seated and paved, the windows kept whole and close."

In 1676 they presented: "Our church fabrick in very good and sufficient condicon of repairs and nothing within it wanting to the decency of a place for the publick worship of Almighty God. Item divine service daily and duely read and the Lords day solemnly observed and kept. Item our churchyard is sufficiently fenced and kept from all annoyance," &c.

In 1682 they presented: "Our parish church is kept in good and sufficient repaire in all parts of it. . . . . Our churchyard is sufficiently fenced and kept from all annoyance."

In 1690: "Our church and chancell is in good and sufficient repair with the windows thereto belonging." "Our churchyard railes are in good and sufficient repaire."

In 1693: "Our church is in good and sufficient repair and all things thereto pertaining."

In 1705: "Our parish church is in good and sufficient

repair. Item our churchyard is safely kept from all annoyance."

Original registers of the church of baptisms, funerals, and marriages by banns for the years following have been proved with regard to this parish: 1691—1734; 1735—1811; 1813—the present time, and in these, records of 291 burials appear.

The plaintiff was licensed as perpetual curate of this church on February 2, 1909. The parish is a very small one, consisting of about 100 people and thirty houses, two-thirds of the parishioners are Catholics and the great majority of them tenants of the defendant; only about twenty parishioners, including children, attend the church.

I will now consider shortly the history, as it has been presented to me, of this church and parish since the Restoration. During this time, the church, as used and as referred to in the churchwardens' presentments, has consisted solely of the present fabric, excluding the ruins; it has been kept in repair by the defendant and his predecessors and the parishioners jointly; the only repairs, on the other hand, that have ever been done to the ruins have been effected by the defendant and his predecessors alone, in whose possession they have apparently remained during the whole time, with the full acquiescence of everybody, until the commencement of the plaintiff's incumbency. During this period, no incumbent has asserted any right to the ruins or any part of them; no bishop or archdeacon has attempted to claim or exercise any authority over them, and no churchwarden or parishioner has made any claim in respect of them, and in the above answers to articles of visitations, to questions as to the state of repair of the church, the same has from time to time been stated to have been in all its parts good and sufficient. Further, during this period, no act of religious worship has taken place within the ruins, the incumbents and parishioners having been, in fact, excluded from them as far as any use of or exercise of rights over them is concerned, and their neglect in those circumstances and the above facts are strong evidence, in the absence of proof to the contrary, of the character of their ownership. A part of a parish church may be private property, and may be so proved by evidence of user, non-repair, &c., if the

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evidence or inference does not shew it to have been part of the parochial church: *Churton* v. *Frewen*. (1) And immemorial repair of a portion of a parish church is evidence of the freehold being in those who have repaired: *Chapman* v. *Jones*. (2)

It is true that, if it be proved that the ruins were, prior to the dissolution of the monasteries, part of the parochial church as such, they would still, apart from a question argued by the defendant on the Statute of Limitations, remain on consecrated ground and retain their parochial character, but the evidence of the last 250 years cannot be lightly disregarded, and every presumption ought to be made in favour of a rightful origin and reason for such possession and acquiescence as that above referred to.

On these points, I may refer shortly to the judgments of the late Lord Coleridge and the Court of Appeal in *Duke of Norfolk* v. *Arbuthnot*. (3) Lord Coleridge, having referred to the facts in that case, said: "Why should I hesitate to give its natural effect to evidence such as I have described? It has been argued that the Dukes of Norfolk were great and powerful noblemen, and that, as the vicar and parishioners of Arundel had no power to contest their usurpations; so acquiescence in these usurpations is not to be used as evidence of their legal origin. I do not know that, as judge of law, or as in this case of fact, I can, or that if I can I ought so to deal with such evidence as this. But the argument, whatever it may be worth, is I think completely met by the fact that, if the Howards were a powerful family, as in one sense no doubt they were, they were also a family belonging, not indeed exclusively, but on the whole and generally, to a religion for many long years proscribed and persecuted. Their ecclesiastical patronage, if Roman Catholics, was exercised by the Universities; they were, if Roman Catholics, the objects of a penal legislation which is to be found described in the burning words of Mr. Burke, and which I take the freedom to say was a disgrace to a civilized country; and I cannot and do not believe in fact that, if this building had belonged to the parish of Arundel, there would have been no attempt on the part of any vicar or parishioners

(1) L. R. 2 Eq. 634. (2) L. R. 4 Ex. 273.
(3) 4 C. P. D. 290, 310, 311.

to revindicate it, none on the part of any Bishop of Chichester or archdeacon to exercise any authority within it, claimed and held as it was by Roman Catholics during so many years of the centuries which rolled by from the time of Queen Elizabeth to the time of George IV." Later on he says: "It is said, however, as I understand the defendant's argument, that, in an ecclesiastical building one and entire, as this is, it is almost impossible to suppose that there would not be one and the same organization throughout it, one and the same set of rights exercised over all its parts." Then the learned judge refers to certain other churches, and proceeds: "That an aisle or a chancel under the same roof with and open to the rest of a church *may* be shewn by evidence to be the property of a private person, is too clear for argument. Such cases exist in considerable numbers in all parts of England. Few of us but are aware of instances which establish this fact."

In the Court of Appeal, Bramwell L.J. says (1): "The view, which ought to be taken of this case, seems to me to be this: There is at Arundel a building which, except that a part is now out of repair, has to the eye the appearance of being a single structure, built at one time, and probably with a view to its use as a whole. Without pretending to any knowledge upon the subject, I may say that it is an ordinary cruciform church, a church with a nave and aisles, with transepts, and with a chancel; and I suppose that if any one had looked at the church before the process of decay had commenced, he would have been of opinion that it was one building, and if he had been told that a part of it was a parish church, he would have said that the whole of it was a parish church. That seems to me the conclusion that any one would have drawn from the appearance of the building, from its character, and the nature of the structure. I think also that if any one had read the various documents of grant and endowment (with one exception to which I will presently advert), he would have thought that they were speaking of one church, of one building, and not of a building which from its origin was divided into two in point of right and in point of use, or at least in point of the power of

(1) 5 C. P. D. 394.

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user: the documents (with the exception which I have mentioned) would rather lead any person to the conclusion that the building was intended to be what it has the appearance of being, namely, one building used for one purpose, and consequently, that if part of it was a parish church, the whole of it was a parish church. But the questions with which we have to deal are not limited to the mere appearance of the building nor to the documents relating to its foundation: on the contrary, a great deal of convincing evidence is to be found in the circumstance, that from the time of the dissolution of the college, and of the surrender to King Henry VIII., down to the present time, the process of decay and desolation has been going on for centuries. This was conceded by the defendant's counsel. From the time of the cesser of the college and its surrender, the so-called chancel has been shut up, and has been disused except for the purpose of the occasional burials of those connected with the plaintiff's family, or with those whom he has succeeded." Then: "If this was truly a part of the parish church, how could the parishioners have permitted this state of decay to go on? It appears to me that I might almost stop here and say that these circumstances can be explained in only one way; and that the explanation is that the chancel never formed part of the parish church, although the whole structure is but one in its character. I may say at once that if I had thought that the chancel at one time had formed part of the parish church, it would do so still, and the plaintiff would have no right to it; because no evidence has been given to shew that what once formed part of the parish church has ceased to be so. But it is unintelligible to my mind that 300 or 350 years ago, the chancel could have formed part of the parish church, and yet that the parishioners should have permitted it to be dealt with in the way in which it has been." Then: "It has been alleged that a bishop would be unwilling to consecrate a church of such a kind as I have mentioned; but I think it a bold thing to contend that a bishop might not have done so some centuries ago: there is no antecedent improbability of fact that it might be done." Baggallay L.J. says (1): "In considering the general question

(1) 5 C. P. D. 399.

thus submitted to us, the first inquiry which suggests itself is in what manner has this chancel been treated and used since the time of its construction? Have the sacred offices been performed in it, which for the time being were usually performed in a parish church? Have the vicars for the time being exercised any authority or control over it? Has its state or condition been inquired into upon the occasion of episcopal or archidiaconal visitation? Has it been kept in repair by those who for the time being would be by law bound to repair it, if it was the chancel of a parish church? All these and other questions of a similar nature have been fully and carefully considered by Lord Coleridge in his judgment, and I do not propose to refer to them further than to say that they must, in my opinion, be answered in the negative, and for the reasons assigned by him the conclusion to be drawn from these questions being so answered is very adverse to the view put forward by the appellant." Then (1): "At the same time I fully assent to the argument pressed upon us by the appellant's counsel that if it is established that the chancel ever formed part of the parish church, in the sense contended for by him, the mere fact of its disuse, even during four or five centuries, would not be sufficient to deprive it of its ecclesiastical character, or the vicar of his rights as such to minister within it." Brett L.J., as he then was, said (2): "It was argued that this state of things could not exist, that no such division of one church could be supposed; but Lord Coleridge has pointed out certain instances in which it has actually happened both in Roman Catholic times and since: I may mention the chapel of Eton College, the Lady Chapel of Ely Cathedral, Carlisle Cathedral, Durham Cathedral, and Merton College, Oxford. In all these cases the church or cathedral has not belonged to the parishioners but to other persons, and the parishioners merely had a right to perform services there. I come therefore to the conclusion that all the acts before the grant by the King to the Earl of Arundel, are consistent with the view that this church belonged to the college and not to the parishioners, but that the parishioners had the right to perform all the services of the Roman Catholic Church in the south transept. But the

(1) 5 C. P. D. 400. (2) 5 C. P. D. 409.

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parishioners have obtained by lapse of time against the Dukes of Norfolk, an absolute right to the whole of the church except the building in dispute, and perhaps the Lady Chapel."

I may add that I have had called before me the Reverend Mr. Peel, who was incumbent of this church from 1877 to 1895, who stated that, during his incumbency, the then Bishop of Worcester was opposed to his making any claim to the ruins, on the ground, as he expressed it, that he had not a leg to stand on.

Such was the position in this parish prior to the date when the plaintiff became incumbent. Peace as well as poverty reigned over it, and the relations between the incumbents and parishioners, on the one hand, and the defendant and his predecessors, on the other, were cordial and harmonious.

Immediately after the advent of the plaintiff, he conceived the idea of improving and enlarging the church, for which purpose the ruins were proposed to be again made use of, and unfortunately, as it seems, without consulting the wishes of his parishioners and the defendant, he had plans prepared for this purpose, and eventually, after much correspondence, he and one of his churchwardens petitioned for a faculty on November 16, 1910, for the purpose of giving effect to his proposals. This was opposed by the people's churchwarden, by the large majority of the vestry and parishioners, and by the defendant, and the following extracts from the judgment of the Chancellor of the diocese upon the petition, which was heard in October, 1911, will sufficiently shew the then position so far as relevant to the present litigation.

The Chancellor of the diocese, after stating that it was a petition by the vicar and one of the churchwardens, and after stating the proposals, said: "Little Malvern is a small agricultural parish with about twenty houses, and a population of a little over 100, which has never varied much, but is somewhat less than when the priory was in existence. The Priory of Little Malvern was a Benedictine Priory founded in the twelfth century, being a cell of the Priory of Worcester, and the monks being removable by the Priors of Worcester. . . . . At the hearing in the Consistory Court questions of title were raised by Mr Berington's trustees as to the ownership of the ruins. I have no

power to try such questions. I was not asked to try them and I did not try them; but I was asked on behalf of the petitioners to grant a faculty as to the ruins 'so far as it did not affect any right of Mr. Berington.' In my opinion such a proceeding would be equivalent to putting the cart before the horse—nothing but extreme necessity could justify such a thing, and here no such necessity exists. Under the circumstances of this parish, the church itself as it now stands affords ample facilities for daily services without building any side chapel. But a more serious question underlies the whole of this petition, namely, the right of the parishioners with regard to their parish church, which after all is the church of the parishioners. What course ought the Chancellor to adopt in such a case?" Then after referring to certain authorities he proceeds: "Is the proposed alteration an improvement? Does it render the edifice more commodious or more fit for its purposes? or if not does it add to its architectural beauty or suitable decoration? If you cannot show this to the Court you must at least show the Court that a majority of those for whose worship the church exists desire the alterations which you propose, and unless proof is clear and manifest as to the benefits to be obtained by such change, the Court ought to be satisfied that there is a general desire on the part of the parishioners, or at least of the actual worshippers being parishioners, that the change should be made. In the present case not only is all proof of this general desire wanting, but such proof as the Court has before it is against its existence; not one single parishioner and not even the churchwarden who signed the petition was called in support of the vicar and his proposals—and the vestry meeting called for the purpose of supporting them not only rejected a resolution in favour of the proposals, but carried a counter resolution by large majorities amounting almost to unanimity. This position was confirmed by the fact that the present churchwarden and three other Church of England parishioners gave evidence that the church was amply sufficient to accommodate the parishioners, and that the proposed changes were undesired and quite unnecessary. I can therefore come to no other conclusion than that this petition is not in reality the petition of the parishioners, but of the vicar and his friends

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The present litigation was then commenced by the plaintiff and one churchwarden—the people's warden, who is not a tenant of the defendant, refusing to join in it. The action has been long, costly, and, if the learned Chancellor of the diocese was right in the views he expressed, I am afraid useless. Possibly if the parishioners and the defendant had been approached in a different spirit, it might have been avoided and an arrangement creditable to all parties concerned arrived at. As it is, however, I have now to decide the complicated and difficult issues that have been presented, according to what I conceive to be the legal rights of the parties, profiting as best I can from the learning and research of the able counsel and experts who have been engaged in the case.

I will deal with the claim to the ruins first. The main contention on the plaintiffs' behalf is that from its earliest foundation this was a parochial church; that it was afterwards appropriated to, but never was the conventual church of, the monastery; that the aisles and transepts built or rebuilt in the fifteenth century were built as, and always remained, an integral part of the then parish church, and as such did not, like the priory, fall within the dissolution statute 27 Hen. 8, c. 28, and consequently did not pass to the predecessors of the defendant on their grant from the Crown, and that being consecrated property, nothing since but an Act of Parliament can divest it of its sacred character (*Reg.* v. *Twiss* (1)), it being thus separated for ever from the common uses of mankind (*Wright* v. *Ingle* (2) and *Sutton* v. *Bowden* (3); see also Phillimore's Eccl. Law, 2nd ed. vol. ii. p. 1399); and that having regard to the Constitution of Otho in 1237, which decreed that all then existing and subsequent churches should be consecrated, and prohibited services therein after two years if consecration did not take place, consecration, even if not proved, must be presumed. It is further contended that the warden's presentments above referred to should be read in the light of presuming a previous unproved faculty to have

(1) (1869) L. R. 4 Q. B. 407, 412. (2) (1885) 16 Q. B. D. 379, 391.
(3) [1913] 1 Ch. 518.

been granted to build out the ruins from the church as then used by reason of the poverty and the small number of parishioners.

An appropriation is the annexing of a benefice to the proper use of some religious body which thereby becomes perpetual curate, and as Lord Stowell said (Phillimore's Eccl. Law, 2nd ed. vol. i. p. 221): "There were two sorts of appropriation, or rather appropriation was authorized to be made with different privileges in two forms, the one pleno jure, sive utroque jure, tam in spiritualibus quam in temporalibus, where the interests in the benefice, both temporal and spiritual, were annexed to some religious house, and the other, non utroque jure, though pleno jure, as it is described, in temporalibus, where temporal interests only were conveyed, such as the tithes or patronage of the benefice; but the cure of souls resided in an endowed perpetual vicar. In the first species, the religious house had the cure of souls and all rights, and performed the duties of the church by its own members, or by stipendiary curates"; and it is the first sort of appropriation which is contended for by the plaintiffs here. For the early history of parochial appropriations, see Burn's Ecclesiastical Law, vol. i. pp. 66 to 75.

The defendant's main contentions on the other hand are that prior to the dissolution of the monastery this was its conventual church, and as such passed to the defendant's predecessors, and that the present parochial character of the church has been acquired since and is limited to that portion in which parochial rights have been allowed to grow up. Parishioners may acquire by lapse of time rights to the whole or part of a parish church, as stated by the Court of Appeal in the Arundel case, founded no doubt on *Buzard's Case* (1), where user for sixty years was held sufficient for this purpose. In the alternative the defendant submits that part only of the church was parochial, and the rest, particularly that portion which was built in the fifteenth century, was "conventual," including the aisles and transepts, in which it is said that there is no trace of parochial rights having ever been exercised. In support of this latter contention, apart from the historical facts to which I shall have to allude, it is urged, and I

(1) 2 Roll. Abr. 289.

ASTBURY J. think with some warrant, that it is especially unsafe, in the case of an ancient church attached to a monastery, to infer that because part is proved to be parochial the rest must be so too, and that for such a small parish it is unlikely that a church of the size of the fifteenth century building would have been erected.

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I will now consider the earlier historical facts and documents proved, in respect of which these conflicting contentions are raised.

The earliest fact which is known to relate to this church is a charter of Bishop Simon of Worcester, dated in the early part of the twelfth century, whereby the bishop granted and confirmed to the church at Worcester, Lesser Malvern, and the church of St. Giles there situated, as that which, in the language of the charter, "in our fee has been founded, and enriched, with a monastic order" in frankalmoin, and he decreed for the common advantage that the church of Worcester should form the body of one inseparable church, with that of Malvern, and Malvern with that of Worcester, and be joined together in a bond of inseparable unity and identity, so that no person should be admitted to the monastic habit in Little Malvern without consulting the Bishop, Prior, and Chapter of Worcester, and that the Prior of Malvern should be chosen by the Chapter of Worcester.

The plaintiffs contend that this shews that a pre-existing church was subsequently enriched with a monastic order, while the defendant contends that this is only consistent with the church being a "conventual" and not a "parish" church, as otherwise it could not be made a cell of Worcester. In the agreed translation of Lyndwood's Provinciale at p. 159b(1) I find the following: "Union properly takes place in things which are of the same nature, for example, in two priories, or in two administrations or obediences, in which a religious house has subjection. It is true that a secular parish church accustomed to be served by secular clerks is not of the same nature as a regular church; wherefore a union cannot strictly take place

(1) Ed. Oxford 1679. [Several necessary corrections have been made in the translation. The references in the original to canonist authorities are omitted.—F. P.]

between them, although the fruits of such a church can be incorporated with other fruits of the regular church, so that the religious house may receive those fruits to its own use, there being reserved a suitable maintenance for the ministers who are to serve the church."

About the same date an agreement was entered into between Aldwin, the founder of Malvern Church, and Richard, the prior, and the whole convent of the same place, and Simon, Bishop of Worcester, Warin, the prior, and the convent of the church of Worcester, whereby the former granted to the latter full partnership in all things.

In 1274 the Prior and Convent of Little Malvern granted that Henry, son of Geoffry Bernard, for benefits conferred upon the monastery, might present a fit secular chaplain to pray for the souls of certain named persons at the altar of the Holy Cross, in the said church, and might, after the decease of the said chaplain, appoint another in his place and so successively for ever. It is apparently inconsistent with the church being a parish church that it should be subjected to this obligation for monastic consideration only.

The Episcopal Register of Worcester shews that in 1282 Bishop Gifford of Worcester visited the monastery of Little Malvern, preaching there, and on the day following he dedicated "their" church of Malvern and remained there for two days as well for the visitation as for the dedication at the cost of the house of Malvern.

Up to this date all that is known of this church points to its being the conventual church of the monastery of Little Malvern, which had been founded in the fee of the bishop and had become a cell of Worcester. On this point the agreed translation of Lyndwood's Provinciale, p. 157b, throws some light.

"Churches are sometimes subject to them (i.e., religious houses) by the terms of the foundation, in which case if in the foundation the founders, being a house of religious persons, reserved nothing to themselves of the property in the endowment bestowed upon the church so founded, then the said men of religion to whom by the terms of foundation the church is so subject, have only the right to require from the rector an account of the

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administration of the temporalities, but cannot appropriate the same to their own use because there has been a complete transfer. But if in the foundation they have retained the property of such goods, only granting beneficial ownership to the administrators and governors to come, then the head (prælatus) of the founder's house may, in the place so founded (not being a parish church) institute at his pleasure a priest or monk, one or more according to the capacity of the church, and may remove them at pleasure. But the minister so instituted must answer to the bishop for the spiritualities, even though he has no flock, for he shall answer in what manner he celebrates, keeps up the church, officiates and the like. The bishop shall also provide there for the sacraments of the Church being administered to the same one or more priests and their servants. And this especially where a church of this kind is not founded in any parish of which the curate is by his office to do that service. In this case also you have to consider that on the part of the religious house founding such church (which by some is called a priory or obedience) the same church priory or obedience is had and held as property but not beneficially. But it is true that in the case before-said the incumbent of such church or priory holds the same not as property but beneficially although he shall not be perpetually instituted in the same." (1)

It appears that in the Taxatio Ecclesiastica of Pope Nicholas in or about the year 1291, in the list of benefices in the diocese of Worcester, the church of Lesser Malvern in the deanery of Poswyk is entered as being taxed at 20*s.*, of which 2*s.* is entered as the tenth, and other parish churches admittedly appropriated to the Priory of Little Malvern appear in the same list.

For the purpose of the taxation of ninths in the reign of Edward III. the parishioners of every parish found upon their oath the true value of the ninths, which were based upon the same receipts as the Pope Nicholas taxation, and the assessors state that they have learnt by the oath of three persons named that the church of Lesser Malvern was taxed at 20*s.* whereof the ninth was worth 12*s.* 8*d.* and no more.

(1) See note at p. 338, ante.

From the Clerical subsidy rolls of the diocese of Worcester for the period 1379-80, there is the following entry: Church of Little Malvern "appropriated" to the prior there, 20*s*. Similar or equivalent entries appear for the years 1449, 1456, and 1514. No entry in the bishop's register of appropriations as to this church has been proved, nor any licence in mortmain, but if the appropriation took place before the Mortmain Acts no such licence would be likely to have existed.

In vol. 5, p. 314, of the Feudal Aids (which was a tax on parishes and towns graduated in proportion to the sums on which Pope Nicholas' tenth was based on their respective churches) a levy of 6*s*. 8*d*. was entered as made in 1428 upon the church of Lesser Malvern.

In these taxing returns appears the first suggestion of parochial rights attached to this church, although it was apparently immaterial to the purpose in hand whether the church was "appropriated" in the strict sense as predicating a pre-existing parish church or not, because ecclesiastical benefices so taxed apparently included conventual property.

Having regard to the foundation of this church and monastery at the date and under the circumstances above mentioned, it seems extremely doubtful whether any deduction of a parochial origin ought to be drawn from the entries in the taxing documents above referred to.

On July 14, 1480, in the chapter house of the Priory of Lesser Malvern, Bishop Alcock, in his character apparently of Abbot of Worcester, received the resignation of the Prior of Little Malvern and declared the priory to be vacant, discharging the monks by reason of their demerits, and no reservation or provision appears to have been made for continuing the services of the church.

On September 11, 1480, Bishop Alcock as founder and patron of the Priory of Lesser Malvern, wishing to provide for the vacant priory, appointed a new prior, and on October 22, 1482, he addressed to the prior and brethren of the Priory of Little Malvern a letter (1), a portion of the contents of which is as

(1) Worcester Episcopal Registers, Bishop Alcock, fo. 111; Nash, Hist. of Worcestershire (1782), ii. 153.

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follows: "And as it is notory knowen through all my diocyse, to the grete displeasure of Godd . . . . the myslyvying and dissolute governnance of the bretheryn that hath byn inhabite yn the place of Littel Malverne, being of my fundacion and patronage; the rules of that holy religion not observed ne kept, but rather the seide bretheryn in all their demeanaunce hath byn vagabunde and lyved lyck laymen to the pernicious example of all cristen men, and therefore it is a grete presumption that the grete ruyne of the church, and place, the decay of lyvehood, and the grete poverty that the seid place hath be now late yn, was that Godd withdrew his grace and bynyfytes, and for the mysgyding thereof was not pleased; and for as moche as now by his grace and mercy I have bylded your church, your place of your logyng is sufficient repaireid . . . . I am now content, that everych of you that was ther before now late, when I take the rule thereof into myne hands, except Dan John Wittesham, which by the law may not be thear, resort to the said place of Lyttle Malverne, and thear to abyde and lyve after your holy profession"; "and also, I desire, and will and pray you for my recompence gostly to have every day a masse at our Lady aulter seyde by oon of the bretheryn for me," and then various masses are provided for each day, and the letter is addressed "To the Prior and Bretheryn of the Priory of Little Malvern."

There is, I think, little doubt on the evidence that Bishop Alcock prior to and about this date built or rebuilt a church including the whole of the present building, with north and south aisles and transepts, of which the present ruins alone remain, and the church so built was erected to the east of the nave of the older church which had existed on the site, and which apparently then remained standing and the roof marks of which are still believed to be visible on the west wall of the tower. If aisles and transepts existed in the twelfth century church, the parishioners apparently did not keep them in repair; if the aisles and transepts of Bishop Alcock's church were parochial, the parishioners ought to have repaired them and we know they did not, and further it is hardly likely that this bishop would have erected chapels in which masses were thenceforth to

be said for him, repairable only by parishioners who hardly existed.

The following entry appears from the register of Archbishop Morton of Canterbury under date 1498: "On the 27th October in the 'conventual' church of Lesser Malvern, the Commissary judicially sitting for a tribunal canonically visited the clergy and people of the deanery of Powyche." It is suggested that this distant prelate may have allowed an incorrect description, namely, "conventual church," to be inserted in his records per incuriam, but it seems to me in accord with what is known about this church up to this date, and in any event there seems no good reason why Bishop Alcock's church should not have been when built by him, as he described it, the church of the monastery, whether or no the parishioners had by this date acquired, originally or by time, some parochial rights in the nave of the older church which was not disturbed, otherwise it is difficult to understand why he should have incurred such expense, especially having regard to Bishop Simon's charter.

In an entry of the Worcester Diocesan Register for the year 1513 a record appears of a visitation of Bishop Sylvester of Worcester by his vicar-general in which there are the following entries: "On Thursday, to wit, the last day of the month of June, he visited the priory of Little Malvern, and in the morning he visited the parish church of Powiche, and on Friday, to wit, the first day of the month of July, he visited the deanery of Powiche in the parish church of Little Malvern."

This is the first and only direct reference, prior to the dissolution of the monastery, to this church as a "parish church," and although the translation of the extract is agreed by both parties, it is suggested by the defendant that having regard to the context and the matters above referred to the words "parish church of Little Malvern" were entered by mistake for "parish church of Greater Malvern."

If the extract correctly represents the facts, it is possible that the words "parish church of Little Malvern" were intended to refer to the nave or parochial portion of the edifice, if such it was, in which the parochial visitation was held. This, however, like much else in the case, is largely guesswork, and the only

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safe course to take appears to me to be to draw such deductions from the case as a whole as seem to best harmonize with the church's history to the present time, always bearing in mind upon whom lies from time to time the shifting burden of proof.

On July 17, 1525, an indenture of lease was executed of certain glebe lands of an adjoining parsonage by lessors described as the "Prior of the House and Church of our Blessed Lady and St. Giles of Little Malvern with the Convent of the same."

In the Valor Ecclesiasticus taken under the First-fruits Act of 1534 for the period 1534-5 under the heading "Priory of Little Malvern" an entry appears—under the title "Spiritualities of the Priory"—of "the rectory of Little Malvern," and there is included under the "rectory" various tithes therein enumerated. This is the first reference to a rectory in connection with this church. Nothing further is known of its origin or creation or of the tithes attached to it. The plaintiffs contend that this postulates a parish church at this date, citing *Holden* v. *Smallbrooke* (1), wherein the following occurs: "A rectory is neither glebe, nor tithe nor both. But the rectory is the church parochial."

In *Berry* v. *Wheeler* (2) it was said that a rectory cannot be without lands, that is, at least church and churchyard.

In Degge's Parson's Counsellor, 7th ed. p. 241, it is stated that "a rectory is a certain portion of lands, tithes and offerings . . . . and properly comprehends the entire parish church."

In Comyns' Digest, 5th ed. vol. iii. p. 541, under "Parson" appears the following: "There need not be more glebe than the soil of the church, or churchyard."

The defendant, on the other hand, submits that a "rectory" did not necessarily postulate a parish church at this date, and might be applied to an ownership of tithes alone, though tithes must predicate a parish. In an anonymous case (3) it was shewn to the Court that "the said rectory did consist only of tithes."

In the Gregorian Decretals (tit. 30, ch. 30), which consists of an answer of the Pope to a French bishop under the canon law, the fact was recognized that there were cases where

(1) Vaugh. 197. (2) 1 Sid. 91.

(3) 2 Leon. 10.

tithes were payable to monasteries and conventual churches, as distinct from parish churches. Further, it is submitted that even assuming that this rectory postulates a parish church, it must have been limited to the parochial portion of the church, if such existed, as in *Boulton* v. *Richards* (1), where it was said that a rectory could be attached to a room in a house used as a chapel and have tithes attached to it. Having regard to what I know of this church and monastery, I am not prepared to hold that, merely because a rectory and tithes existed, the whole of the sacred building before the dissolution was parochial.

In the following year, 1535, this monastery was dissolved and passed to the Crown with everything belonging to it, and the effect of s. 8 of the Act establishing the Court of Augmentations in the same year was to deconsecrate all conventual property so passing.

From this date there have been put in a number of accounts rendered by the King's receiver to the Court of Augmentations relating to the affairs of this priory, the first of which is for the twelve months succeeding the dissolution, during which period the prior and monks remained in possession paying rent, and the account is "of all and singular bailiffs, farmers, ministers, reeves and other occupiers of lordships, manors, lands and tenements, rectories and other possessions whatsoever, as well spiritual as temporal, in the hands of the Lord the King happening and coming by reason of the dissolution," and under the heading "Priory of Little Malvern lately dissolved," "£10-6-8 of rents of the site of the priory with the demesne lands, meadows, feedings, and pastures, of the late priory aforesaid, kept in hand and occupied this year by John Bristowe, the late prior and the convent there, in and towards hospitality and relief of the inmates within the house" are accounted for. "Tithes of the Rectory of Little Malvern in the hands of the said late Prior" are also entered, and the receiver discharges himself of certain moneys therein referred to "because they the Prior and Convent aforesaid have perceived all the profits thereof growing and coming towards hospitality and support of

(1) 6 Price, 483.

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the house aforesaid in this year beyond the value of certain grain" and so on, and "because the tithes as well greater as lesser were converted by the aforesaid late Prior towards the hospitality of the aforesaid house and towards divers necessaries for the church bought and expended in the same this year by the said late Prior." In 1536 a valuation appears in the Augmentation Court Records, and under the heading "Priory of Little Malvern," "The annual valor of the site of the late priory with the demesne lands there occupied and reserved, in the hands of the late prior and convent there" are entered as follows, so far as they are relevant to this action: "The site of the late priory, with orchards, gardens, stables, and other houses there, necessary and suitable to the farmer, by the year: 13*s.* 4*d.*"; and then a large number of pastures are similarly dealt with and there is no express mention of the church. In the same year this property was let from year to year after the prior and monks had departed to one John Russell, who subsequently obtained a twenty-one years' lease of the same, and in the next account dealing with the possessions of the late Prior of Little Malvern the demise to John Russell is referred to, and in the outgoings we now find the Crown debited with the stipend of the curate administering the sacraments and sacramentals there, by the year, 6*l.* 13*s.* 4*d.* This and later accounts make it clear that at the date of the dissolution and subsequently some parochial rights existed in connection with this church and that the Crown was until the final disposal of the conventual property debited with the stipend of a curate either for administering the sacraments or, as appears later, for celebrating divine service there; how and when these rights arose, no one knows, nor in what part of the pre-dissolution church they were exercised, but the plaintiff has not satisfied me that any such exercise took place until after the dissolution in any portion of the building erected by Bishop Alcock.

In the following year John Russell petitioned Thomas Cromwell for his good offices in obtaining a grant of this property, and in the petition there is the following: "It maie further please your Lordship of your blessed disposicon and cheritie to be so good

unto the Kings pouer tenants of Litil Malverne now suters unto his highness for their fyve bells that have alwaies served their parische Churche. As wele as the monastery there late suppressed amounting all in value " to the sum named . . . . " or atte lest his most noble and gracious favor to have before strangers perferment in the sale of the same bells " ; and in the receiver's accounts for this year delivered to the Court of Augmentations there are the following entries under the heading of " Malverne late Priory dissolved " : " And in money paid to Thomas Beele Chaplain celebrating divine service and serving the Cure in the Parish Church of Malverne appertaining to the late Priory of Lesser Malverne suppressed, as for his Stipend by consideration had thereof by the Commissioners abovesaid at the time of the suppression of the same late Priory," and then the stipend is referred to, " and in money paid by the said Receiver for the expenses of the Commissioners of the Lord the King . . . . as well at the time of the devastation and spoliation of the House of the said late Priory as about the sale of the Bells there " &c. Then there is this curious entry: " And in money paid for the wages of the carpenters and stonemasons pulling down and spoiling of such Tower or Belfry of the Church of Malverne aforesaid and pulling down the Bells of the said Tower or Belfry " and the amount is stated. Then the price obtained for the bells is also entered in the account.

These two documents, that is the petition of John Russell and this last receiver's account, are of much importance. Both John Russell and the King's receiver use the expression " parish church," and the Crown is, as in other accounts since the dissolution, debited with the stipend of the curate, but Russell asks to buy back the bells that never would have passed to the Crown if the whole church had been parochial, and the receiver describes as " parish church " a building the tower of which he paid for spoiling and pulling down; both are consistent with parochial rights having previously existed in the old church or the nave of the old church, neither is consistent with even the tower of Bishop Alcock's church having been or become prior to the dissolution parochial and non-conventual property.

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It is said by the plaintiff that John Russell's petition shews no conflict between himself and the parishioners as to the church and that his reference to "parish church" must have meant the whole edifice then standing, as the monks had then gone, but he is speaking of the bells that "had" always served their parish church; further at this date Russell and the parishioners would be all of one religion and probably equally desirous of the Catholic services being continued, as best they could, independently of any question of ownership of the church fabric or any part thereof; and in these, as indeed in all these old documents, it seems to me most important to guard oneself against reading into them meanings and inferences, with regard to an acute controversy of to-day, that those responsible for them cannot have had in their contemplation. That there were and had been parochial rights in this church at and prior to the dissolution is I think clear, and it does not militate against this view that a curate's stipend appears in the accounts for the first time after the dissolution, as prior to that date the cost of carrying on such of the services as were parochial would have been borne by the priory, whether they employed a secular priest for this purpose or not.

In the receiver's accounts for the year ending September, 1539, it is shewn that the tithes of the rectory of Little Malvern were collected for the Crown. And in 1540 the receiver accounts to the Crown for the subsidy levied on the "pension" (i.e., the sum paid in lieu of tithes) of the "curate of Little Malvern Parish" as so described. In the accounts for the year ending September, 1542, the Crown is debited with the stipend of the "clerk curate of Little Malvern Parish Church" 5*l.*, as allowed in the preceding year.

In 1543 the first grant was made by the Crown of this property, to Richard Andrewes and Nicholas Temple, and the grant was of "All that site sept circuit ambit and precinct of the late priory of Lesser Malverne in our said county of Worcester with all its rights members and appurtenances and all and singular our houses buildings garths orchards gardens" &c. thereto belonging and various pastures and meadows to hold by the services of a fortieth part of one knight's fee. It is not disputed

that "precinct" includes all within the outer walls of the monastery buildings, including the church, if such were not parochial.

And about this date there is, in a receipt in the Record Office, evidence that the parish of Little Malvern was of a size containing thirty-three heads of families. In 1544 the first mention of churchwardens of Little Malvern parish appears in a clerical subsidy receipt, none such being known to have existed prior to the dissolution.

In 1550 the Crown leased for twenty-one years to one Dodyngton, inter alia, the tithes of the rectory of Little Malvern, parcel of the possessions of the late priory there.

In 1553 an inventory taken under an Act of Edward VI. of the bells, plate, and ornaments "within the parish of Lytle Malvern made and presented to the Kings Majesty's commissioners by Thomas Bell curate of the same parish and John Marten churchwarden" shews one chalice, three old copes, two vestments, one cross of copper and two small bells "whereof one is not our own." The monastery goods having passed to the Crown at the dissolution, this inventory could only have been made of the articles surviving, as having belonged to the parish. It apparently shews sufficient for the service of one altar only, and not sufficient for a church containing side aisles and transepts with further altars there, and although it is true that after the dissolution and Reformation churches only used one altar, it certainly points to what I presume was the monastic furniture of the other altars in the church having been disposed of.

In the receiver's accounts for the year ending September, 1554, it appears that the above grantees Andrewes and Temple had assigned the subject-matter of their grant to one Henry Russell, and that the Crown was still paying the curate's stipend. By Letters Patent dated September 26, 1554, the Crown granted to the said Henry Russell and another "All that our Lordship and Manor of Lesser Malvern" with its rights "heretofore belonging to and pertaining to the Priory of Lesser Malvern" "and parts of the possessions and hereditaments of the same late Priory whilst it was in being," and various messuages and pastures again detailed, and after referring to the lease of tithes

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to Dodyngton granted "to the said Henry Russell" and the other person "the reversion and reversions of all and singular the aforesaid tithes with all and singular parts and the aforesaid annual rent . . . ."; and the document says, later, "and also all and singular our tithes of sheaves grain and hay and other our tithes whatsoever both greater and less and the personal tithes annually arising from or being renewed within the parish of Lesser Malvern in the said county of Worcester of the Rectory of Lesser Malvern . . . . belonging to and a parcel of the possessions of the said late Priory"; and towards the end of the document the stipend of 5*l.* arising from Lesser Malvern and annually paid and in future to be paid to the priest curate for the time being ministering sacraments and sacramentals to the inhabitants and parishioners in Little Malvern is now imposed upon the grantees. These grantees are predecessors in title of the defendant and his trustees, and they now and from thenceforth became responsible for the curate's stipend, payment of which ceases to be debited to the Crown from this date.

In 1585 the following facts appear from the answer of the curate and churchwardens to visitation articles of the then Bishop of Worcester. The clerk curate and the churchwardens and parishioners "do sett downe and answere to the" articles. "They do saie and aunswere that the neighboures and poore cottagers of Malverne parva aforesaide beinge verie poore and not haveinge amonges them all so moche as one half plowghe lande of arrable to sowe corne uppon to sustaine them . . . . have not in theire churche the bible of the last translation." "But they do saye and aunswere that they have in theire churche a very faire bible . . . . bownde wth bordes and claspes" ". . . . that they knowe not who is patrone and that there is not so moche as one acre of Glybe lande in the parrishe belonginge either to parsonage or vicarage And that there is not with them other person or vicar, but only a stipendary curate, who for his servings there hath an annuitie of five poundes by the yeare payd unto him by the handes of Maister John Russell lorde of the sayde parrishe." ". . . . and that Mr. John Russell hathe in and by his purchasse of the lordshippe from the

prince all the tuyethes thereof. And that the uttermost that ever they knewe to be mad of the tuythes of the said parrishe was but twentie sixe shillinges and eighte pennce" and so on.

Little if anything is known of the history of this church and the condition of its structure from this date until 1662, when the churchwardens presented that it was somewhat out of repair, and a little later when it was said by them to be in good repair in all its parts. At the latter date it is plain that the ruins had been excluded from the church and that a window previously lighting the north aisle had been built into the present north wall of the church when the arches previously leading from the choir into the north aisle and transept were walled up. What the condition of the building was after the King's agents had worked their will upon it immediately subsequent to the dissolution I know not: I have had different opinions expressed on the point by able witnesses in the box, but I will assume in favour of the plaintiffs' contention that the side aisles and transepts remained until the time of the Civil War or thereabouts, although this has not been proved. When the nave of the old church which existed before Bishop Alcock's building finally disappeared is also unknown, but while it remained it seems probable from the evidence that from the monastic cloisters on the south side of the church one door led into Bishop Alcock's south transept and another into the old nave, between the rood screen and the choir screen. If this was so, the choir screen originally stood in about the same plane as the western wall of the tower, and the rood screen still further to the west—in the nave. At some date after the dissolution the choir screen was moved up to the position which it now occupies, considerably to the east of the east wall of the tower, and the rood beam fixed above it—and this alteration of the rood beam is believed to have been effected prior to 1559. This change in the position of the choir screen and rood beam would, I infer, probably take place in the reign of Queen Mary, when the owners of the monastery property and the parishioners may very well have been of one mind as to the desirability of continuing the administration of the sacraments and the holding of services in the church, and the effect of the alteration would

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have been to create a new nave at the western end of Bishop Alcock's choir, no doubt amply sufficient with the restricted chancel remaining for the exercise of any parochial rights in the church that had previously existed, and no evidence has been given that any such were ever exercised in any other portion of Bishop Alcock's church prior to or from the date of such change. If, as I believe to have been the fact, Bishop Alcock's building was conventual and not parochial, this theory certainly involves the acquiescence of the defendants' predecessors in title, but if such acquiescence had not taken place the exercise of the parochial rights could no doubt have been claimed in the old nave if it still existed or in some restored building upon its site, if the parish had been in a position to afford the expenditure necessary for the purpose. Whatever may have been the circumstances under which the change came about, I see no inherent improbability of the defendants' predecessors as lay rectors and patrons of this little benefice having concurred in the transfer of the parishioners' rights to, or in the exercise of their rights in, the choir of the church of which they had become owners while they and the parishioners were still all probably of the same faith—especially if, as seems not improbable, the old nave had not survived the partial demolition of the tower by the Crown—and some provision for the exercise of such parochial rights had to be made. At a later date, when the owners of the conventual property could no longer continue the services of their faith in this church, they may have arranged for or consented to the use of the north aisle window, in shutting out that portion of their property in which no parochial rights had been exercised from that which by their conduct and acquiescence had come to be regarded as the church of the parish. Be all this as it may, and much of it is little more than surmise, the onus lies on the plaintiffs to prove that the present ruins form part of the parish church. The above are the materials upon which they base their claim, and in my judgment they have failed to establish it, especially having regard to the history of this little church and parish during the last 250 years.

[His Lordship then examined the evidence as to the land claimed as part of the ancient churchyard, and decided that the

plaintiffs' claim to this failed, and dismissed the action with costs.]

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Solicitors: *Brooks, Jenkins & Co.; Calder Woods & Pethick, for Lambe, Carless & Son, Hereford.*

J. R. B.

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May 7, 8, 13, 14, 21.

[1913 P. 1477.]

Settled Land—Licensed Premises—Lease by Tenant for Life—Charges under Licensing Act—Compensation Fund—Deduction from Rent—Statutory Provision against contracting out—Covenant by Lessees to pay Rent without Deduction—Covenant to pay Charges—Reservation of "best rent that can reasonably be obtained"—Consideration for Grant of Lease—Settled Land Act, 1882 (45 *&* 46 *Vict. c.* 38), *s.* 6; *s.* 7, *sub-ss.* 2, 3; *ss.* 53, 54—*Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 3, *sub-ss.* 1, 3—*Licensing (Consolidation) Act*, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 21, *sub-ss.* 1, 3.

By s. 3, sub-s. 3, of the Licensing Act, 1904, and s. 21, sub-s. 3, of the Licensing (Consolidation) Act, 1910, it was provided that deductions from rent in respect of compensation fund charges imposed upon licensed premises "may, notwithstanding any agreement to the contrary," be made by any licence-holder paying a charge under those sections.

In 1905 the defendants, a brewery company, who were lessees of licensed premises at a yearly rent of 150*l.* under a lease for fourteen years from June 24, 1902, granted under the Settled Land Act, 1882, by a previous tenant for life, deducted from their rent the compensation fund charges levied under the provisions of the Licensing Act, 1904. The tenant for life, who was an illiterate man, complained of the deductions and the defendants subsequently agreed that if he granted them a new lease for twenty-one years at the same rent of 150*l.* they would pay the charges themselves. Accordingly, the tenant for life, without having any legal assistance or consulting the solicitor to the settled trust estate, in exercise of his statutory powers granted the defendants a new lease of the licensed premises for twenty-one years at a yearly rent of 150*l.*, and the defendants covenanted to pay the rent without deduction, and also to pay all rates, taxes, assessments and charges, including all payments to the compensation fund under the Licensing Act, 1904, which then were or during the term should be charged on the demised premises without making any deduction from rent in respect thereof. The defendants had paid the charges under the Licensing Act in fulfilment of their promise.

In an action by the remaindermen against the defendants for

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declaration that the lease did not reserve the best rent that could reasonably be obtained, and was not binding upon them :—

Held, that there was no valid reservation in the lease of the real amount which was to be paid for the use of the premises ; that the rent which was really reserved was 150*l.* subject to the deductions, and no more, and was obviously, in the circumstances, not the best rent that could be obtained ; and that therefore the new lease was not a valid lease under the provisions of the Settled Land Act, 1882, so as to be binding upon the remaindermen.

WITNESS ACTION.

By the will of J. Simms, who died in 1893, certain real estate, including licensed premises known as the Park Inn, Heath Town, Staffordshire, was devised to his wife for life and after her death to W. J. Smith for life with remainder to his children, the plaintiffs.

By lease dated May 16, 1902, the testator's widow, as tenant for life under the Settled Land Acts, demised the Park Inn to the defendant brewery company for fourteen years from June 24, 1902, at a yearly rent of 150*l.*, the defendant company covenanting to pay and discharge all rates, taxes, assessments and charges, whether parliamentary, parochial, or of any other kind, which then were or during the said term should be imposed or charged on or payable in respect of the demised premises or the landlord or tenant in respect thereof except the landlord's property tax.

The testator's widow died in November, 1902, and thereupon Smith became tenant for life in possession.

In 1905 a charge was imposed on the Park Inn in respect of contribution to the compensation fund under s. 3 of the Licensing Act, 1904 (1), and the defendant company by virtue of sub-s. 3

(1) The material provisions of s. 3 of the Licensing Act, 1904, are as follows :—

"(1.) Quarter sessions shall, in each year, unless they certify to the Secretary of State that it is unnecessary to do so in any year, for the purposes of this Act impose, in respect of all existing on licences renewed in respect of premises within their area, charges at rates not exceeding and graduated in the same proportion as the rates shown in the scale of maximum charges set out in the First Schedule to this Act."

"(3.) Such deductions from rent as are set out in the Second Schedule to this Act may, notwithstanding any agreement to the contrary, be made by any licence holder who pays a charge under this section and also by any person from whose rent a deduction is made in respect of the payment of such a charge."

of that section made certain deductions in respect of the charge so levied from the rent payable by them under their lease.

Smith complained of the deductions, and it was subsequently arranged between the defendant company and Smith, who was an illiterate man, that a new lease for twenty-one years at the same nominal rent of 150*l.* should be granted by Smith upon the promise by the company that they would not deduct the levy or contribution which under the Act they would be entitled to deduct. This arrangement was made without the tenant for life having any independent legal assistance and without the knowledge of the solicitor to the testator's trust estate, the promise of the company to bear the levy or contribution being the sole inducement to the tenant for life to grant the new lease.

In pursuance of the arrangement so made, Smith, as tenant for life under the Settled Land Acts, in October, 1906, demised the Park Inn to the defendant company for twenty-one years from September 29, 1906, at a yearly rent of 150*l.*, the company covenanting to pay the rent without any deduction and pay and discharge all rates, taxes, assessments, and charges, including all payments to the compensation fund under the Licensing Act, 1904, which then were or during the said term should be imposed or charged on or payable in respect of the demised premises without making any deduction from rent in respect thereof.

The defendant company paid the charges imposed on the demised premises under s. 3 of the Licensing Act, 1904, in fulfilment of their promise and without making any deduction from the rent of 150*l.* payable to the tenant for life.

The remaindermen subsequently commenced this action against the company for a declaration that the lease so granted by the tenant for life was not binding upon them inasmuch as it did not reserve the best rent that could reasonably be obtained.

At the trial evidence was given with regard to the circumstances attending the grant of the new lease and also with the object of shewing that a higher rent than 150*l.* could not have been obtained for the property.

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Tomlin, K.C., and *Beebee*, for the plaintiffs. In a case like this, in which there are no special directions in the will, the charge for the compensation fund is a charge which the tenant for life is bound to keep down out of income: *In re Smith* (1); and the agreement, although made subsequently to the Licensing Act, 1904, is not effective to negative the licence-holder's right of deduction: *Wooler* v. *North Eastern Breweries*. (2)

It cannot be said that 150*l.* was the best rent that could reasonably be obtained within the meaning of s. 7, sub-s. 2, of the Settled Land Act, 1882, because the lessees were willing to pay, in addition to the rent nominally reserved, the compensation fund charge which it was the tenant for life's duty to pay out of his own income, and moreover the tenant for life in exercising his power of leasing did not have due regard to the interests of all parties entitled under the settlement within the meaning of s. 53 of the Settled Land Act, 1882, but was deriving a benefit for himself. In these circumstances the lease is not binding upon the remaindermen: *Chandler* v. *Bradley* (3); *In re Chawner's Settled Estates* (4); *In re Handman and Wilcox's Contract*. (5)

Further, having regard to the provisions of s. 3, sub-s. 3, of the Licensing Act, 1904, and s. 21, sub-s. 3, of the Licensing (Consolidation) Act, 1910 (6), the payment by the lessees of the compensation fund charges could not be enforced, and to satisfy

(1) [1906] 1 Ch. 799.
(2) [1910] 1 K. B. 247.
(3) [1897] 1 Ch. 315.
(4) [1892] 2 Ch. 192.
(5) [1902] 1 Ch. 599.
(6) The material provisions of s. 21 of the Licensing (Consolidation) Act, 1910, are as follows:—

"(1.) The compensation authority shall, in each year, unless they certify to the Secretary of State that it is unnecessary to do so in any year, for the purpose of their powers and duties under this Act as compensation authority, impose in respect of all old on-licences renewed in respect of premises within their area, charges at rates not exceeding, and graduated in the same proportion as, the rates shown in the scale of maximum charges set out in the First Part of the Third Schedule to this Act."

"(3.) Such deductions from rent as are set out in the Second Part of the Third Schedule to this Act may, notwithstanding any agreement to the contrary, be made by any holder of a licence who pays a charge under this section, and also by any person from whose rent a deduction is made in respect of the payment of such a charge."

the requirements of s. 7, sub-s. 3, of the Settled Land Act, 1882, the covenants in a lease under the Act must be validly enforceable at law: *Boyce* v. *Edbrooke*. (1) On this ground also the lease cannot be supported.

Hughes, K.C., and *F. O. Langley*, for the defendants. The evidence shews that 150*l.* was full rent for these premises both in 1902 and 1906. The deduction in respect of the compensation fund is casual and uncertain, and in some years may possibly be nothing at all, so that it cannot be expressed in rent. Because the defendants were willing to make a concession, it does not follow that a higher rent would have been paid or obtained if there had been no such concession. The defendants wanted security of tenure, but they did not want or intend to give more rent than 150*l.* The best criterion in ascertaining whether the best rent has been got is that laid down in the case of the *Queensberry Leases* (2), namely, to inquire whether the tenant for life has done as well for the remaindermen as he has for himself, and the answer in this case is in the affirmative, for this covenant is with the remaindermen as well as with the tenant for life, and as the payments in respect of the compensation fund increase as the term runs out the remaindermen benefit.

There is no evidence of want of good faith, and, that being so, it is not for the purchaser or lessee to shew that the highest price or rent is given, because s. 54 of the Settled Land Act, 1882, provides that a lessee dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best rent that could reasonably be obtained by the tenant for life: *Hurrell* v. *Littlejohn*. (3) The promise to pay the deductions was a privilege or concession and was no indication that a further rent could have been obtained, and is not sufficient to avoid the lease: *Shannon* v. *Bradstreet* (4); Farwell on Powers, 2nd ed. p. 622. *Chandler* v. *Bradley* (5) was a case of a bribe, but there was no bribe here.

By the lease of 1906 the defendants covenanted to pay all

(1) [1903] 1 Ch. 836.
(2) (1817) 5 Dow, 293, 344.
(3) [1904] 1 Ch. 689.
(4) (1803) 1 Sch. & Lef. 52.
(5) [1897] 1 Ch. 315.

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charges, including compensation fund charges under the Licensing Act, 1904, and their covenant would include all charges under s. 21 of the Licensing (Consolidation) Act, 1910, the power to deduct payments in respect of charges being permissive under those two Acts, namely, "deductions may be made notwithstanding any agreement to the contrary." Sect. 2 of the Finance Act, 1912, contains a similar but stronger provision under which the lessee "shall be entitled notwithstanding any agreement to the contrary" to make the deductions in respect of the duty there mentioned. These payments were not in the nature of rent and could not have been reserved as rent, for it is not possible to evade the provisions of an Act of Parliament by a subterfuge: *Lord Ludlow* v. *Pike* (1), approved in *Tuff* v. *Guild of Drapers of the City of London.* (2) The agreement to pay these charges does not shew that the best rent was not reserved: *Cox* v. *Harper.* (3)

Tomlin, K.C., in reply. The defendants knew that the tenant for life was an illiterate man, and in "dealings with uneducated ignorant persons, the burthen of shewing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract": per Lord Hatherley in *O'Rorke* v. *Bolingbroke* (4); the defendants have not discharged that burden or shewn that they were dealing in good faith with the tenant for life within the meaning of that term as indicated by Kay L.J. in *Mogridge* v. *Clapp* (5) and Stirling J. in *Chandler* v. *Bradley* (6), so as to be entitled to the protection of s. 54 of the Settled Land Act, 1882.

The principle of the decision in *Shannon* v. *Bradstreet* (7) was discussed by Lord St. Leonards in Sugden on Powers, 8th ed. p. 780, and he says that the principle must be applied with caution to cases in practice. His subsequent observations tend to shew that the rent in this case was clearly not the best rent that could have been obtained.

Cur. adv. vult.

(1) [1904] 1 K. B. 531.
(2) [1913] 1 K. B. 40.
(3) [1910] 1 Ch. 480.
(4) (1877) 2 App. Cas. 814, 823.
(5) [1892] 3 Ch. 382, 401.
(6) [1897] 1 Ch. 315, 323.
(7) 1 Sch. & Lef. 52.

May 21. JOYCE J., after stating the facts and referring to the evidence, continued: Now is the lease good or bad, by which I mean is it such a lease as is authorized under the provisions of the Settled Land Act, and thereby made binding upon the remaindermen, because that is the material question in the action?

The Settled Land Act requires, among other things, that every lease, in order to be binding upon the remaindermen, shall be by deed, and be made to take effect in possession not later than twelve months after its date, and every lease shall reserve the best rent that can reasonably be obtained. Then there is s. 54, which provides that the tenant for life shall be considered as a trustee for executing the trusts in the granting of such a lease. Those being the requirements of the Act, there is in this lease a provision as to the rent to be paid, but the reservation of the rent is admittedly invalid or not enforceable. It is a lease with such a reservation of rent as the law does not permit to be validly made. I think that a lease by deed under this Act must be a valid lease, and I think also that there must be a valid reservation of the rent. A lease upon terms not allowed by the law or by statute and therefore invalid will not, in my opinion, satisfy the requirements of the Act, and under the Settled Land Act the fact of the reservation of the rent being invalid is, in my opinion, fatal to this lease considered as a lease under the Act. I know it is said that the extra payment is not rent. Technically it may not be rent, but it is part of the consideration agreed to be paid for the use of the premises. There is no enforceable obligation to pay the amount which the brewers promised and agreed to pay, and not even in form is there a covenant to pay, over and beyond the 150*l.* nominally reserved, a sum equal to the amount of the contribution under the Licensing Act, whether that would have been good or not. Such undoubtedly was the bargain, namely, to pay the 150*l.* and the contribution, the promise to pay the contribution being, as I say, the sole inducement to the tenant for life to grant a new lease at all.

Now was 150*l.* the best rent for the further or extended term? A great deal of evidence as to the value &c. has been called

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before me which I do not consider to be really material. To my mind the thing speaks for itself. The rent nominally expressed to be reserved is 150*l.*, necessarily subject to the deduction. But part of the consideration for the grant of the new lease was the promise to pay the contribution. It was the sole inducement for granting the new lease. There is no valid reservation as rent of the amount that was agreed to be paid,—the rent really reserved is 150*l.*, subject to the deduction, and no more. The lessees were willing and promised and agreed to pay more as it was worth their while to do—I have not the slightest doubt about that—and they insist upon retaining the lease on the footing of paying both. How, then, can the rent of 150*l.* subject to the deduction, as it necessarily was, be the best rent, although it may be that the amount obtained, or agreed upon,—I mean the 150*l.* plus the amount of the contribution—was possibly more than any one but a brewer, or a sitting tenant, would have given? In my opinion it was not the best rent, and, as I have said already, to my mind the transaction speaks for itself.

I ventured to put this to Mr. Hughes:—Suppose there was under consideration between a tenant for life of a public-house and a brewer the tenancy of a public-house for an annual payment of 160*l.*, and supposing this were carried out by a regular and formal lease by deed at a rent of 150*l.* with a contemporaneous solemn promise, only verbal, by the brewer to pay the 10*l.* more, that is to pay the 160*l.* which, of course, could not be enforced because it would be a verbal contemporaneous variation of a formal deed. Would that be such a lease as is authorized by the Settled Land Act? I rather think it was admitted that it would not, but, at all events, I am of opinion that it would not. I have no doubt about it, and for these reasons—that there would be no covenant for payment or any reservation by deed of the rent actually agreed upon. The facts with regard to its being a high rent or what no one else would have given would be quite immaterial. The rent reserved by the deed, namely, 150*l.*, would obviously not be the best rent. I think similar considerations apply to the present case, the only difference being that the covenant for the payment or reservation of the extra payment of the contribution

is there, in this case, in words, but is by statute invalid, no better than wastepaper, and no more binding than the verbal promise in the case which I have supposed.

The result, quite irrespective of the evidence of the valuers, is, in my opinion, that this new or extended lease, the inducement for which, as I say, was this invalid promise, is bad. On the face of it this lease is not a valid lease under the provisions of the Settled Land Act so as to be binding upon those who take in remainder under the Settled Land Act. That is all I need say except that the provision in s. 54 with respect to a lessee dealing in good faith has not the slightest bearing upon this case. There must be a declaration that this lease was not a valid exercise of the statutory leasing powers of the tenant for life and is not binding as against the persons taking in remainder.

Solicitors: *Billing & Co., for A. A. Rollason, Birmingham; Miller & Smiths, for Fowler, Langley & Wright, Wolverhampton.*

R. M.

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March 2, 3, 17.

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[1913 L. 671.]

River Thames—Drainage of Metropolis—London County Council—Powers—Construction of Works "in, over, or under" Bed of Thames—Port of London Authority—Approval—Licence—Interference with Navigation—Metropolis Management Act, 1855 (18 *&* 19 *Vict. c.* 120), *s.* 135—*Metropolis Management Amendment Act*, 1858 (21 *&* 22 *Vict. c.* 104), *s.* 28—*Thames Conservancy Act*, 1894 (57 *&* 58 *Vict. c. clxxxvii.*)—*Port of London Act*, 1908 (8 *Edw.* 7, *c.* 68).

By s. 135 of the Metropolis Management Act, 1855, the Metropolitan Board of Works, to whose powers and obligations the London County Council have now succeeded, were required to make such sewers as they might think necessary for preventing all or any part of the sewage of the metropolis from flowing or passing into the river Thames in or near the metropolis and to cause such sewers and works to be completed on or before December 31, 1860, and also to make all such other sewers and works and such diversions or alterations of any existing sewers or works vested in them under that Act as they might from time to time think necessary for the effectual sewerage and drainage of the metropolis.

By s. 28 of the Metropolis Management Amendment Act, 1858, "In order to preserve the navigation of the river Thames, the plans of any work to be constructed under the authority of this Act upon the banks, bed, or shore of the river Thames, which may interfere with the free navigation of the said river, shall be approved by the conservators of the river Thames, in writing signed by their secretary, before such works are commenced, certifying that the works according to such plans will not interfere with the navigation of the river Thames":—

Held, that s. 28 of the Act of 1858 was a subsisting enactment.

Held, therefore, that the London County Council were entitled by virtue of the Acts of 1855 and 1858 to construct works in, over, or under the bed of the river Thames, and that the Port of London Authority, who had succeeded to the powers and obligations of the conservators of the river Thames, were bound to consider, pursuant to s. 28 of the Act of 1858, any plans of works which might be submitted to them by the London County Council, and if they were of opinion that such works or any of them would not interfere with the navigation of the river Thames to approve the plans for the same and give their certificate accordingly, and that as to any works the plans of which might have been so approved and as to which the certificate above mentioned had been given the London County Council were not bound to obtain any further licence from the Port of London Authority.

Special Case.

The action was brought by the London County Council against

the Port of London Authority claiming by their writ (1.) a declaration that the defendants were bound to consider and approve pursuant to s. 28 of the Metropolis Management Amendment Act, 1858 (21 & 22 Vict. c. 104), the plans of a storm-water outlet proposed to be constructed by the plaintiffs at Shadwell in the county of London and to certify that the works according to such plans would not interfere with the navigation of the river Thames; (2.) a declaration that the defendants ought, under the same section, to have approved the plans of and certified the extension of the plaintiffs' jetty at their Barking outfall sewer works; (3.) a declaration that a sewer recently constructed by the plaintiffs under and across the bed of the creek known as Deptford Creek was not such a work as to require the approval of the defendants under the said Act; and (4.) a declaration that the plaintiffs were entitled to carry out each of the three above-mentioned works without obtaining any licence from the defendants in that behalf under the Thames Conservancy Act, 1894.

The parties subsequently concurred in stating the questions of law arising in the action in a special case for the opinion of the Court.

The special case, after describing the nature of the works (paragraph 1) in connection with the proposed storm-water outlet at Shadwell, (paragraph 2) in connection with the proposed Barking outfall sewer, and (paragraph 3) the sewer which had been constructed by the plaintiffs under Deptford Creek, and stating that the plaintiffs had never submitted or supplied to the defendants any plans of the said sewer although requested to do so, stated as follows:—

4. The plaintiffs in support of their contentions relied upon the provisions of (*a*) the Metropolis Management Acts, (*b*) the Main Drainage Acts, (*c*) the Metropolitan Board of Works (Loans) Acts, 1869 to 1871, (*d*) the London County Council (Money) Acts, 1875 to 1911, and (*e*) the Thames Embankment Act, 1862, and in particular upon the sections set out or referred to in this and the seven following paragraphs of the case. By s. 135 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), the Metropolitan Board of Works, to whose powers the plaintiffs afterwards succeeded by virtue of s. 40, sub-s. 8, of the

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Local Government Act, 1888, and who were thereinafter for brevity called "the Board," were required to make such sewers and works as they might think necessary for preventing all or any part of the sewage within the metropolis from flowing or passing into the river Thames in or near the metropolis and to cause such sewers and works to be completed on or before December 31, 1860, and also to make all such other sewers and works and such diversions or alterations of any existing sewers or works vested in them under that Act as they might from time to time think necessary for the effectual sewerage and drainage of the metropolis.

5. By the Metropolis Management Amendment Act, 1858 (21 & 22 Vict. c. 104), which by s. 33 thereof was to be read together with the Metropolis Management Act, 1855, as one Act, further powers in the matter of main drainage were conferred upon the Board. Sects. 1, 2, 26, 27, 28, and 29 of the Act were as follows:—

Sect. 1. "The Metropolitan Board shall cause to be commenced as soon as may be after the passing of this Act, and to be carried on and completed with all convenient speed according to such plan as to them may seem proper, the necessary sewers and works for the improvement of the main drainage of the metropolis, and for preventing, as far as may be practicable, the sewage of the metropolis from passing into the river Thames within the metropolis."

Sect. 2. "The Metropolitan Board of Works, for the purposes of this Act, may construct any work through, along, over or under the bed and soil and banks and shores of the river Thames, making compensation to all persons having any interest in any wharfs, jetties, or other property damaged by such works, as provided by the [Metropolis Management Act, 1855,] in respect of property injured under the powers of such Act."

Sect. 26 (repealed in 1869 by 32 & 33 Vict. c. 102). "The time limited by section 135 of the said Act of the eighteenth and nineteenth years of Her Majesty, for the completion of the sewers and works necessary for preventing the sewage of the metropolis from passing into the river Thames in or near the metropolis, shall be extended to the 31st day of December, 1863."

Sect. 27. "No works upon the bed or shores of the said river Thames below high water mark which may interfere with the navigation of that river shall at any time be commenced or executed under the provisions of this Act without the same having been previously approved of by the Lord High Admiral or the Commissioners for executing the Office of Lord High Admiral; such approval to be from time to time specified in writing under the hand of the Secretary to the Admiralty."

Sect. 28. "In order to preserve the navigation of the river Thames, the plans of any work to be constructed under the authority of this Act upon the banks, bed, or shore of the river Thames, which may interfere with the free navigation of the said river, shall be approved by the conservators of the river Thames, in writing signed by their secretary, before such works are commenced, certifying that the works according to such plans will not interfere with the navigation of the river Thames."

Sect. 29. "Nothing in this Act contained shall extend or be construed to extend to prejudice or derogate from the rights of the conservators of the river Thames, or to prohibit, defeat, alter, or diminish any power, authority, or jurisdiction which at the time of the passing of this Act the said conservators did or might lawfully claim, use, or exercise, so far as such rights, power, authority, or jurisdiction may be exercised for preserving the free navigation of the river Thames."

6. By the Metropolitan Main Drainage Extension Act, 1863 (26 & 27 Vict. c. 68), the Board were empowered to borrow further money for the purposes of the said Act of 1858, therein called the "Main Drainage Act, 1858," and the time for the completion of the works authorized to be executed by the Board for the main drainage of the metropolis was extended to December 31, 1866.

7. By the Act 28 & 29 Vict. c. 19 (1865) the time for the Board to borrow the sums authorized by the preceding Act was extended to December 31, 1867.

8. By the Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 Vict. c. 102), the Board for the purposes (amongst others) of the execution of the lastly above-mentioned three Acts, therein and in the First Schedule thereto referred to as the

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"Main Drainage Acts," were empowered (s. 22) to levy a consolidated rate. By s. 25 all works executed (before or after the passing of that Act) by the Board under the Main Drainage Acts were to be deemed works for carrying into effect a plan for preventing the sewage of the metropolis from flowing into the river Thames in or near the metropolis. Sect. 36 (so far as material) was in the following terms:—

"The Board may create consolidated stock for the purpose of raising, in addition to the loans authorized by the Acts mentioned in the First Schedule to this Act, such further sums as the Treasury may sanction for the following purposes; namely,

"(1.) For the purpose of completing the works authorized by the Main Drainage Acts, and for covering in and otherwise completing and making efficient the main sewers transferred to and vested in the Board by the Metropolis Management Act, 1855; . . . . and all the provisions of this Act shall apply in like manner as if such sums were loans authorized by the Main Drainage Acts, ... and all the provisions of those Acts relating to the execution of works . . . . authorized by them shall continue in force and extend to the works executed by means of the money raised in pursuance of this section, and all stock created under this section shall be deemed to be created for the purposes of the above-mentioned Acts respectively."

And by s. 50 certain enactments which included s. 26 of the Act of 1858 and the whole of the Acts of 1863 and 1865 were repealed.

9. From the year 1875 onwards the Metropolitan Board of Works and afterwards the plaintiffs obtained each year from Parliament a "Money" Act authorizing the raising and expenditure of money for the purposes in the Act specified. The Metropolitan Board of Works (Money) Act, 1880 (43 & 44 Vict. c. 25), by s. 10 specially empowered the Board to expend moneys not exceeding 300,000*l.* for the purpose of adding to, extending, enlarging, improving, and completing the works authorized by the Main Drainage Acts and for rendering the same efficient in such manner as to them might seem proper, and for extending, enlarging, and improving the main sewers transferred to and vested in the Board under and by virtue of the Metropolis

Management Act, 1855, and for making such other sewers and works and such alterations and diversions of such existing main sewers as might to them seem proper for the purpose of relieving, supplementing, and rendering such main sewers efficient and for carrying into effect the several provisions in relation thereto mentioned in the said Act, and provided that all the provisions of the Main Drainage Acts and the Metropolis Management Act, 1855, and the Acts altering or amending the same for the time being in force relating to the execution of works authorized by the said Acts respectively should continue in force and should extend and apply respectively to the works executed by means of money raised in pursuance of this section. Similar special powers and provisions were contained in the "Money" Acts of each year from the year 1880 up to and including the year 1890. In and from the year 1891 the form of the "Money" Acts was altered, but the plaintiffs contended that their effect was the same. In s. 4 of the "Money" Act of 1896 (59 & 60 Vict. c. ccxiv.) the works for which expenditure was authorized expressly included new main sewers and relief sewers. In the year 1898 the form of the Act was again altered, the purposes upon which expenditure was permitted being specified in a schedule.

10. The Act of 1869 (with the said "Money" Acts) was repealed and many of its provisions re-enacted with amendments by the London County Council (Finance Consolidation) Act, 1912 (2 & 3 Geo. 5, c. cv.).

11. By the London County Council (Money) Act, 1912 (2 & 3 Geo. 5, c. ciii.), the council was empowered, as appeared by s. 4 of that Act and Part I. of the schedule thereto, to expend on capital account for the purposes of the Acts relating to the main drainage of the metropolis for the year ending March 31, 1913, up to an estimated requirement of 350,000*l.*, and for the half-year ending September 30, 1913, up to an estimated requirement of 100,000*l.* The plaintiffs alleged that it appeared from the estimates prepared by the council and referred to in the said Act that each of such estimated requirements included money to be expended upon the said storm-water outlet and the sewer under Deptford Creek, though no other public or parliamentary notice was given of either of such particular items of expenditure.

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The expense of the extension of Barking jetty was met out of the yearly levy for rates.

12. The conservators of the river Thames were incorporated by the Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.). That statute was repealed and the provisions thereof were re-enacted and the constitution and powers of the conservators altered and extended by the Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), and by the Port of London Act, 1908 (8 Edw. 7, c. 68), the defendants were incorporated for the purposes and with the powers and obligations therein referred to, and all rights, powers and duties of "the conservators of the river Thames" in respect of the river Thames below the landward limit of the Port of London were (inter alia) thereby transferred to the defendants.

13. On November 6, 1911, the plaintiffs sent to the defendants for their approval pursuant to s. 28 of the Metropolis Management Amendment Act, 1858, plans of the proposed Shadwell outlet and applied to the defendants to approve the said plans and certify that the said work would not interfere with the navigation of the river Thames; but the defendants refused to entertain such application, alleging that s. 28 was not applicable to such work. They, however, forwarded to the plaintiffs copies of the form of application and regulations whereof copies were annexed to the case and marked respectively "F" and "G" and required them to apply to the defendants under s. 109 and the following sections of the Thames Conservancy Act, 1894, in such form as aforesaid and pursuant to such regulations as aforesaid for permission or licence to construct the said Shadwell outlet, and the defendants offered to give such permission or licence upon certain conditions which the plaintiffs were not prepared to accept, some but not all of such conditions being directed to the preservation of the navigation of the river Thames. The plaintiffs alleged that the said storm-water relief outlet would not interfere with the free navigation of the river Thames within the meaning of s. 28 of the Metropolis Management Amendment Act, 1858. The defendants, however, considered that the said works would interfere with the free navigation of the said river and for the purpose of minimizing such interference required the

plaintiffs to comply with the said conditions which were specified in a letter from the defendants to the plaintiffs dated January 15, 1912.

14. The plaintiffs commenced the work of the said extension of the Barking jetty without obtaining the certificate of the defendants under s. 28 of the Metropolis Management Amendment Act, 1858, or any licence from the defendants, but the defendants in this particular instance and for the purposes of this case only were willing to treat the matter as if the work had not been actually commenced. The plaintiffs alleged that the said extension would not interfere with the free navigation of the river Thames within the meaning of s. 28 aforesaid. The defendants, however, considered that the said extension did interfere with the free navigation of the said river and they contended that the plaintiffs ought to have made application to them in the said annexed form marked "F" and pursuant to the said annexed regulations marked "G" and ought to have obtained such a permission or licence as aforesaid, and the defendants admitted that they would have refused to approve the said extension under s. 28 of the Metropolis Management Amendment Act, 1858.

15. The construction of the said relief sewer under Deptford Creek was commenced by the plaintiffs without any notice to the defendants and without their knowledge and was completed after protest by the defendants. It was the fact that the said sewer did not interfere with the existing navigation of the said creek or of the river Thames. It might, however, put a limit to the deepening of the channel in the future and the improvement of the navigation to meet the continually increasing size and draught of the vessels and craft using the river Thames and the Port of London, but there were at the present time other sewers under the bed of Deptford Creek at this place at a higher level than the said relief sewer. The defendants also contended that the construction of the said sewer was a work in the bed of the river Thames and was therefore unlawful without the licence of the defendants under s. 111 of the Thames Conservancy Act, 1894. The defendants therefore required the plaintiffs to make such an application as aforesaid and obtain such a licence as aforesaid

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in respect thereof, but the plaintiffs refused to make any such application.

16. The questions of law for the opinion of the Court were:

(1.) Whether the plaintiffs were entitled to construct works in, over, or under the river Thames by virtue of the statutes hereinbefore referred to.

(2.) Whether the defendants were bound to consider, approve, and certify, pursuant to s. 28 of the Metropolis Management Amendment Act, 1858, (A) the plans of the said Shadwell storm-water outlet; (B) the plans of the Barking jetty extension; and (C) plans of the said relief sewer under Deptford Creek.

(3.) Whether the plaintiffs were bound to obtain any, and if so what, certificate or licence of the defendants under (A) the Metropolis Management Acts, or (B) the Thames Conservancy Act, 1894, and the Port of London Act, 1908, before commencing any works in respect of (1.) the Shadwell outlet; (2.) the Barking jetty extension; (3.) the relief sewer under Deptford Creek.

(4.) Whether the defendants were entitled to impose in a licence granted by them under the Thames Conservancy Act, 1894, and the Port of London Act, 1908, conditions other than conditions for preserving the free navigation of the river Thames, and in particular whether the defendants were entitled in licensing the said storm-water outlet at Shadwell to impose conditions as to the purity of the effluent or requiring payment to be made for such licence.

The case was heard by Warrington J. for Neville J. on March 2 and 3, 1914.

Macmorran, K.C., *Clauson, K.C.*, and *F. F. Daldy*, for the plaintiffs.

P. O. Lawrence, K.C., *G. R. Northcote*, and *C. B. Marriott*, for the defendants.

The arguments sufficiently appear from the special case and the judgment.

The following cases were cited:—*Brownlow* v. *Metropolitan Board of Works* (1); *Canada Southern Ry. Co.* v. *International*

(1) (1863) 13 C. B. (N.S.) 768; in Ex. Ch. (1864) 16 C. B. (N.S.) 546.

Bridge Co. (1); *Kearns* v. *Cordwainers' Company* (2); *Price's Patent Candle Co.* v. *London County Council.* (3)

Cur. adv. vult.

March 17. WARRINGTON J. read the following judgment:— This is a special case stated in an action in which the London County Council are plaintiffs and the Port of London Authority are defendants. The plaintiffs are entrusted with the construction, maintenance, and improvement of the main drainage system of the metropolis, and they have recently proposed to carry into effect certain additions to and improvements in that system, and in doing so to construct works upon, over, or under the bed of the river Thames. The defendants (who for this purpose have succeeded to the duties and rights of the Thames Conservancy) insist that the plaintiffs cannot lawfully construct these works without the licence of the defendants, which may be withheld by them if they so think fit or may be granted on such conditions as they may impose, including the payment of money. The plaintiffs contend that they are entitled to construct the works in question without the licence or consent of the defendants, the only restriction (material to be mentioned here) imposed upon them being the necessity of obtaining the certificate of the defendants on a matter of fact—namely, that the works will not interfere with the navigation of the river. The defendants conceiving that their rights are of the wider nature above mentioned have at present refused to consider the plaintiffs' application for a certificate. I do not propose to say anything on the merits of that application or the principles which ought to guide the Authority in dealing with it, those matters not being now before the Court. The additions and improvements consist of three items of which it is enough for the present purpose to say that all of them involve the construction of works upon, over, or under the bed of the river.

The statutes on which the plaintiffs rely as giving them the right they claim are the Metropolis Management Act, 1855, and the Metropolis Management Amendment Act, 1858. Sect. 135 of the

(1) (1883) 8 App. Cas. 723. (2) (1859) 6 C. B. (N.S.) 388.
(3) [1908] 2 Ch. 526.

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Act of 1855, after providing for the vesting in the Metropolitan Board of Works (to whose rights, duties, and powers in this respect the plaintiffs have succeeded) of the main sewers of the metropolis, proceeds as follows: "and such Board shall make such sewers and works as they may think necessary for preventing all or any part of the sewage within the metropolis from flowing or passing into the river Thames in or near the metropolis, and shall cause such sewers and works to be completed on or before the 31st day of December, 1860, and shall also make all such other sewers and works, and such diversions or alterations of any existing sewers or works vested in them under this Act, as they may from time to time think necessary for the effectual sewerage and drainage of the metropolis, and shall discontinue, close up, or destroy such sewers for the time being vested in them under this Act as they may deem unnecessary, and such Board shall from time to time repair and maintain the sewers so vested in them, or such of them as may not be discontinued, closed up, or destroyed as aforesaid; and for the purposes aforesaid such Board shall have full power and authority to carry any such sewers or works through, across or under any turnpike road, or any street or place laid out as or intended for a street, as well beyond as within the limits of the metropolis, or through or under any cellar or vault under the carriageway or pavement of any street, and into, through, or under any lands whatsoever within or beyond the said limits, making compensation for any damage done thereby as hereinafter provided." The time limit for the construction of the works was several times extended and was ultimately repealed by the Metropolitan Board of Works (Loans) Act, 1869. The Act of 1855 gave the Board no power to construct works upon or under the bed of the river Thames. (See *Brownlow* v. *Metropolitan Board of Works*. (1))

The Metropolis Management Amendment Act, 1858, contains the following material provisions. It is intituled "An Act to alter and amend the Metropolis Local Management Act (1855), and to extend the powers of the Metropolitan Board of Works for the purification of the Thames and the main drainage of the

(1) 13 C. B. (N.S.) 768.

Metropolis." The preamble is as follows: "Whereas it is necessary, with a view to the health of the metropolis, that works should be speedily undertaken and completed for the purification of the Thames and for the improvement of the drainage of the metropolis, and for this purpose it is expedient that the Act of the session holden in the eighteenth and nineteenth years of Her Majesty, 'for the better local management of the metropolis,' should be amended"; then it is enacted as follows: [His Lordship read ss. 1, 2, 27 and 28, and continued:] Then s. 33 provides that "The said Act of the eighteenth and nineteenth years of Her Majesty and this Act shall be read together as one Act." The effect of the direction in s. 33 is thus stated by Willes J. in *Brownlow* v. *Metropolitan Board of Works* (1): "The proper way of dealing with this question," he says, "is, to put the two Acts—18 & 19 Vict. c. 120"—that is the Act of 1855—"and 21 & 22 Vict. c. 104"—that is the Act of 1858—"together, and to treat the 135th section of the former as if it were found in an Act of which the 2nd section of the latter formed one of the sections. There would then be a general clause giving the Board power to construct their works in all places within the limits of the metropolis, and then a special clause dealing with works to be done in the bed or soil of the river Thames: and, of course, in considering what are the powers conferred upon the Board with respect to works to be done in the bed of the river, regard must be had to the special clause only, and not to the general provision."

In the Money Acts of the plaintiffs and their predecessors down to and including that for the year 1910, the Act of 1858 is in terms included in the Acts relating to the main drainage of the metropolis for the purpose of which the plaintiffs and their predecessors are by such Money Acts authorized to borrow money. Since 1910 the Act of 1858 is not mentioned by itself, but the Acts are referred to generally as the Acts relating to the main drainage of the metropolis. For some time the Money Acts of the Metropolitan Board of Works contained express provisions that the Acts of 1855 and 1858, and other Acts, should extend and apply to the works for which money was

(1) 13 C. B. (N.S.) 790.

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desired to be raised. This, however, has not been done for more than twenty years past. I think it is clear that the Legislature has consistently treated the Act of 1858 as a subsisting enactment relating to main drainage, and none the less that it has not of late years thought it necessary, while mentioning it as one of the Acts conferring the necessary authority to construct works, and thus recognizing it as subsisting, to go further and in terms provide that it shall apply so as to authorize such works.

I now come to the position of the defendants. They are the successors of the Thames Conservancy in the part of the river Thames in question. The Act now regulating their rights and duties as conservators is the Thames Conservancy Act, 1894. The material sections are s. 109, s. 111, and s. 224, sub-s. 3. Sect. 109 is as follows: "The conservators may from time to time for a fair and reasonable consideration (such consideration to be either a sum in gross or an annual rent or partly a sum in gross and partly an annual rent and so far as a sum in gross to be paid at the time of granting the licence) and upon such terms and subject to such restrictions as they think proper grant to any owner or occupier of any land adjoining the Thames a licence under the hand of the chairman of the conservators or the secretary for all or any of the following purposes." Then there are a number of purposes mentioned which it is immaterial to read. Then s. 111 is as follows: "No person shall make or form any recess dock bed for boats or barges basin pier jetty landing-place wharf bank dwarf wharfing way quay or embankment wall or other work or drive any piles or do any stone pitching in or upon the bed or shores of the Thames or erect establish or use any stage crane apparatus or other machinery in or upon the bed or shores of or afloat in the Thames below Teddington Lock for the unloading or discharging of vessels without a licence under the hand of the chairman of the conservators or the secretary." Then s. 224, sub-s. 3, is this: "Nothing in this Act shall prejudice lessen affect or interfere with any of the powers rights authorities or privileges of the said council"—that is the London County Council—"under any Act now in force."

The contention on the part of the defendants is that the Act of 1858 is no longer operative, that the only Act under which the plaintiffs derive their powers to construct the works in question is the Act of 1855, and that, inasmuch as this Act gives no authority to construct the works upon or under the bed of the river, they cannot be constructed without the defendants' consent, and they have accordingly refused to entertain an application for a certificate under s. 28 of the Act of 1858, insisting that the application must be for a licence under s. 109 of the Act of 1894. Whether they are right in this is the question. It is quite true that s. 1 refers to certain works to be commenced and completed as soon as possible, but having regard to s. 33, and applying the principles enunciated by Willes J. in the passage quoted above from his judgment in *Brownlow* v. *Metropolitan Board of Works* (1), I am of opinion that s. 1 cannot be read as confined to the works mentioned in s. 1, but being read as a section of the Act made up of the two Acts extends to works constructed under the general powers of the Act of 1855. In my judgment, therefore, the plaintiffs are entitled to construct the works in question upon, in, or under the bed of the river provided they obtain the certificate of the defendants required by s. 28 of the Act of 1858. The defendants have hitherto refused to entertain or consider the question of giving or withholding their certificate under the Act of 1858, and in this I think they are wrong. It is their duty to consider this question fairly, and if they come to the conclusion that as to any of the works they ought to give their certificate, the plaintiffs will be entitled to proceed without further consent from them. If they consider it their duty to withhold their certificate as to any of the works different considerations would arise. It may be that the plaintiffs will then admit that they must obtain the defendants' consent, or they may refuse to do so and require that question to be determined. I do not think, however, that the Court ought to express an opinion as to the rights of the parties in an event which has not happened and may not happen.

I propose to answer the questions as follows: As to question 1, that the plaintiffs are entitled by virtue of the Acts of 1855 and 1858 to construct works in, over, or under the river Thames.

(1) 13 C. B. (N.S.) 768, 790.

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In answer to question 2, that the defendants are bound to consider, pursuant to s. 28 of the Act of 1858, the several plans mentioned in the question, and if they are of opinion that such works or any of them will not interfere with the navigation of the river Thames to approve the plans for the same, and give their certificate accordingly. In answer to question 3, that as to any works the plans for which may be so approved and as to which the certificate above mentioned is given, the plaintiffs are not bound to obtain any further licence of the defendants. Question 4 does not at present arise. I think the defendants must pay the costs up to the date of this order.

Solicitors: *Edward Tanner; Ernest Glenshaw.*

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[1914 E. 326.]

Perpetuity—Settlement—Trust for Sale to arise "at the expiration of twenty-one years" from Date thereof.

By a settlement dated May 13, 1892, the settlor conveyed real estate unto and to the use of two trustees in fee simple upon the trusts thereinafter declared, and it was thereby declared that the two trustees, or the survivor of them or other the trustees or trustee for the time being thereof (thereinafter called the said trustees or trustee), should stand possessed of the said premises during the term of twenty-one years from the date thereof upon trust to apply the rents and profits as therein mentioned, including the payment of an annual sum of 320*l.* on May 13 and November 13 in each year; and it was thereby further declared that the said trustees or trustee should "at the expiration of the said term of twenty-one years" sell the said premises as therein mentioned.

On June 20, 1913, the two trustees named in the settlement, pursuant to the foregoing trust for sale, contracted to sell the real estate to the defendant, who took the objection that the trust for sale was void for remoteness:—

Held that, the determination of the term and the commencement of the trust for sale arising at one and the same moment, the trust was not void for remoteness on the ground that it was limited to take effect "at the expiration" of the term.

Held, also, that according to the true construction of the settlement the term commenced from midnight on May 12, and therefore the trust

for sale was not void for remoteness on the ground of exceeding a term of twenty-one years from its creation.

Semble, that if the trust for sale had otherwise been void for remoteness it would not have been saved by the fact that it was being exercised by the two trustees originally named in the settlement.

TRIAL OF ACTION.

By an indenture of settlement dated May 13, 1892, and made between one George Walker of the one part and Richard Massey English and John Harrison of the other part, certain freehold hereditaments known as the Waplington estate in the county of Yorkshire were conveyed by the said George Walker unto and to the use of the said R. M. English and J. Harrison, their heirs and assigns, upon the trusts thereinafter declared; and it was thereby declared that "the said R. M. English and J. Harrison or the survivor of them or other the trustees or trustee for the time being of these presents (hereinafter called the said trustees or trustee) shall stand possessed of the said hereditaments and premises during the term of twenty-one years from the date of these presents upon trust out of the rents and profits to pay to Ann Haigh during the said term of twenty-one years, if she shall so long live, for her separate use without power of anticipation, the annual sum of 320*l.* by equal half-yearly payments on the 13th day of May and the 13th day of November in every year"; and after her death, in case she should die during the said term of twenty-one years, to pay or apply the said annual sum as therein directed, and to pay and apply the residue of the rents and profits during the said term of twenty-one years as therein directed; and it was thereby declared that "the said trustees or trustee shall at the expiration of the said term of twenty-one years sell the said hereditaments and premises hereby conveyed" and stand possessed of the proceeds of sale upon the trusts therein declared.

In pursuance of this trust for sale the said R. M. English and J. Harrison on June 20, 1913, put the estate up for sale by public auction, at which it was purchased by the defendant. The defendant, however, refused to complete the purchase on the ground that the trust for sale in the indenture of settlement under which

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the trustees purported to sell the property was void as infringing the rule against perpetuity.

The plaintiffs then brought this action for specific performance.

Clauson, K.C., and *A. Adams*, for the plaintiffs. It is no answer to a sale by the original trustees named in the settlement to suggest that under other circumstances if the sale were being made by new trustees it would be open to objection on the ground of perpetuity. There can be no objection to a sale under the trust by the original trustees who represent lives in being at the date of the settlement itself.

[WARRINGTON J. called on counsel for the defendant.]

Cave, K.C., and *A. Andrewes-Uthwatt*, for the defendant. If the trust for sale is otherwise void for perpetuity it makes no difference that it is being exercised by the original trustees. The period during which the trust is suspended is not defined by their lives, and the trust is indivisible and cannot be severed so as to be partly good and partly bad. A power stands on a different footing: *In re De Sommery.* (1) [They also cited *Kennedy* v. *Kennedy.* (2)]

Where, as in the present case, the period is not defined by lives or a life in being the extreme limit allowed by law is the period of twenty-one years from the date of the execution of the settlement: Lewis on the Law of Perpetuity, p. 164; *Palmer* v. *Holford* (3); *In re Daveron.* (4)

The trust for sale in the present case infringes the rule in two ways. In the first place it is limited to arise "at the expiration" of the term of twenty-one years, in other words the term is to expire before the trust arises, and a mere fraction of time added in excess of the allowable term makes the whole trust bad. The text-books which state that, in order to comply with the rule in *Cadell* v. *Palmer* (5), the limitation must take effect "within the period" are in our favour on this point: Preston on Abstracts, 2nd ed. vol. ii. p. 159; Butler's note to Fearne's Contingent Remainders, 10th ed. vol. i. p. 566, n.; Gray on Perpetuities, 2nd ed. s. 201 p. 166.

(1) [1912] 2 Ch. 622.
(2) [1914] A. C. 215.
(3) (1828) 4 Russ. 403.
(4) [1893] 3 Ch. 421.
(5) (1833) 1 Cl. & F. 372.

[*Clauson, K.C.*, referred to Lewis on the Law of Perpetuity, p. 161, where the language "on the determination" is used.]

In the second place the period runs from the date of the creation of the trust: *Cadell* v. *Palmer* (1); and in the present case the Court will infer that the execution of the settlement took place certainly before midnight on May 13, 1892, while according to the ordinary rule of construction the term runs from midnight on the same day: Norton on Deeds, pp. 163, 165; *Dollar* v. *Parkington* (2); *Smith* v. *Gold Coast and Ashanti Explorers.* (3) The period of the suspension of the trust for sale, therefore, exceeds the term of twenty-one years by the fraction of the day of May 13 which intervened between the actual execution of the deed and midnight on the same day.

No reply was called for.

Warrington J. It is a curious thing that it should now fall to the Court to determine for the first time whether a trust which arises at the expiration of a term of twenty-one years from the date of a deed is a trust exceeding the period allowed by the rule against perpetuity, which when there are no lives or life in being in question is a gross term of twenty-one years.

The question arises on a settlement dated May 13, 1892, whereby the settlor assured a freehold estate unto and to the use of R. M. English and J. Harrison, their heirs and assigns, upon trust that "the said R. M. English and J. Harrison or the survivor of them or other the trustees or trustee for the time being of these presents (hereinafter called the said trustees or trustee) shall stand possessed of the said hereditaments and premises during the term of twenty-one years from the date of these presents" upon trust to pay and apply the rents and profits as therein mentioned; and it was thereby declared that "the said trustees or trustee shall at the expiration of the said term of twenty-one years sell the said hereditaments and premises hereby conveyed" and stand possessed of the proceeds of sale upon certain trusts therein declared. In pursuance of this

(1) 1 Cl. & F. 372. (2) (1901) 84 L. T. 470.
(3) [1903] 1 K. B. 285.

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trust for sale R. M. English and J. Harrison, who are still living and are still trustees of the settlement, put up the estate for sale by auction on June 20, 1913, when it was purchased by the defendant, and the defendant now refuses to complete the purchase because these trustees cannot, as he alleges, make a title inasmuch as the trust for sale is void as infringing the rule against perpetuity, and the question which I have to decide is whether that contention on the part of the defendant is well founded.

The first point taken by the defendant's counsel is this. They say that an estate or a trust, in order to be valid and not to exceed the limit laid down by the rule against perpetuity, must, where there are no lives or life in being to be taken into account, arise not later than the term of twenty-one years from its creation. For the moment I do not propose to consider from what period in this particular case the term of twenty-one years is to be computed, but whatever that period may be, it is contended on the part of the defendant that the trust in question must arise not later than the expiration of that period, and that if it does arise at a later date then it is void as infringing the rule against perpetuity; and it is further contended that inasmuch as the trust in this case arises "at the expiration" of the term of twenty-one years it necessarily follows that it does not arise within the period. Is that argument sound? It is perfectly true that in many of the well-known text-books relating to the rule against perpetuity the rule is stated somewhat in this form, namely, that the estate or the trust or other limitation must arise "within" the period allowed by law, and I am quite willing to accept that statement as being for all practical purposes a sufficient statement of the rule, but when I come to consider what that statement means and to apply it to such a case as the present, then, in my opinion, the trust which is to arise "at the expiration" of the term of twenty-one years does arise "within" the period of twenty-one years, because I should have to resort to all sorts of subtle calculations and distinctions unless I were to hold that an estate or a trust to arise coincidently with the termination of the period of twenty-one years was a valid estate or trust. To put an analogous case which occurred to me in the course of the

argument; there must be many cases in which a testator has fixed the period of twenty-one years from his death as that at which a class of beneficiaries is to be ascertained, for example a trust for such members of a class of persons as shall be living at the expiration of twenty-one years from his death. I think that any lawyer dealing with such a limitation as that would say without doubt that it was a good limitation, and yet in that case it is necessary to wait until the last infinitesimally small fraction of a minute has expired before it can be said whether a certain number of persons will be living or not at the expiration of that moment of time. The trust in the present case is to arise at the expiration of the term of twenty-one years, and if looked at from one point of view that trust arises coincidently with the last moment of the term, although, if looked at from another point of view, it may be said to arise at some infinitesimally small fraction of time after the last moment of the term. In my opinion, however, the only sensible view to be taken of such a limitation is that the term determines and the trust arises at the very same moment of time, and if looked at in that way it is impossible to say that the trust arises at a later period than that allowed by law. It seems to me therefore that the term determines and the trust arises at mathematically and identically the same moment, and so far as that objection goes I am of opinion that the trust is a good one. There is no direct authority to the contrary. I think, however, that there is some authority in support of the view which I have expressed to be found in the famous case of *Cadell* v. *Palmer*. (1) In that case the question which arose for determination was whether in order to comply with the rule against perpetuity it was possible to fix a term of twenty-one years in gross without reference to lives in being, and that point was determined in the affirmative. Now the form of the question put to the judges in that case is as follows (2): "First, whether a limitation, by way of executory devise, is void, as too remote or otherwise, if it is not to take effect until after the determination of one or more life or lives in being and"—this is the material part—"upon the expiration of a term of twenty-one years afterwards, as

(1) 1 Cl. & F. 372. (2) 1 Cl. & F. 411.

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a term in gross, and without reference to the infancy of any person who is to take under such limitation, or of any other person." I need not read the second and third questions put to the judges. The important question in its bearing on the present case is the first, and that question, leaving out the lives or life in being, was, whether a limitation by way of executory devise is void if it is not to take effect except upon the expiration of a term of twenty-one years. The judges advised the House that such a limitation was valid, and Lord Chancellor Brougham in adopting that opinion of the judges concluded his speech in these terms (1): "The rule will then be, that a limitation will not be too remote if the vesting be suspended for twenty-one years beyond a life or lives in being; but that beyond that period it would." If therefore the trust is suspended, that is to say, does not come into effect for a period of twenty-one years, but on the expiration of that period does come into effect, then it is a good trust. If, on the other hand, it is not to take effect for a period longer than twenty-one years, then it is a bad trust. In the present case the trust is—to use Lord Brougham's expression, though it is not strictly applicable—"suspended" for a period of twenty-one years and no longer. It seems to me therefore that *Cadell* v. *Palmer* (2) is an authority for the view which I have expressed that this trust which is limited to take effect immediately on the expiration of the term of twenty-one years is a valid trust.

But a second point was urged by counsel for the defendant, namely, that the term of twenty-one years must be computed from midnight on May 13, 1892,—the day on which the deed was executed—and would therefore expire at midnight on May 13, 1913, and inasmuch as the deed must, as they contend, be presumed to have been executed—that is signed, sealed, and delivered—some time prior to midnight on May 13, 1892, the estate in the trustees took effect on the execution of the deed, and consequently the term during which the trustees held the estate without the trust for sale arising was a longer term than the law allows by the number of hours which elapsed between the actual execution of the deed and midnight on May 13, 1892. Is that the true view of the law? Reliance has been placed on the statement—which appears

(1) 1 Cl. & F. 423. (2) 1 Cl. & F. 372.

to be quite accurate—in Norton on Deeds at p. 163, where the rule is thus stated: "In computing a period of time from the date, or the day of the date, of a deed, or any fixed day—that day is prima facie to be excluded, but the context or other admissible evidence may shew that it is to be so included." The question which I have to determine, therefore, is, whether the direction to the trustees in this deed to sell "at the expiration of the term of twenty-one years from the date of these presents" means from midnight on May 13 or from the actual hour when the deed was executed or from midnight on May 12. It is admittedly a question of construction of the deed. There is no absolute rule with regard to the inclusion or exclusion of the day on which a particular event takes place, and I have to determine the meaning of this particular deed. There are two authorities which appear to me to be relevant to the question which I have to determine, and I will look at the terms of the deed to see how far those authorities are applicable. The first is *Pugh* v. *Duke of Leeds* (1), which is thus stated on p. 165 of Norton on Deeds: "In that case there was a power in a settlement to make leases in possession; the donee of the power made a lease in intended exercise of the power, habendum from the day of the date of the lease. Lord Mansfield, on the principle ut res magis valeat quam pereat, held that the term commenced on the day of the date"—that is to say, the term included the day on which the lease was actually executed. But there is a still more important case—*Russell* v. *Ledsam* (2)—which is also referred to at p. 165 of the same text-book, relating to the computation of a period of fourteen years granted to a patentee. The letters patent were dated February 25, 1825, and the question arose whether the term of fourteen years from February 26, 1825, the date of the letters patent, expired at midnight on February 25, 1839, or at midnight on February 26, 1839. The decision was that they expired at midnight on February 25, 1839, in other words, that the day of the date of the letters patent was included in the term for which the letters patent were granted. In the particular passage in the judgment dealing with that question Parke B.,

(1) (1777) Cowp. 714.

(2) (1845) 14 M. & W. 574.

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delivering the judgment of the Court, says (1): "The question is, whether the day of the date of the first letters patent was inclusive or exclusive. The usual course in recent times has been to construe the day exclusively, whenever anything was to be done in a certain time after a given event or date; and consequently the time for enrolling a specification within the six months given by the proviso is reckoned exclusively of the day of the date; and many other instances are collected in the cases of *Webb* v. *Fairmaner* (2) and *Young* v. *Higgon*. (3) But in this case the question is when the term given by the patent commences; and the same rule would apply as to the commencement of a term, which, if it is to run from the date of the lease, includes the day of the date." Parke B., therefore, expressed the opinion that in the case of a lease for a certain number of years from its date the day on which the lease was executed was included in the term and not excluded, and he applied that principle to the case before the Court and held that the letters patent expired at midnight on February 25, 1839, and did not continue during February 26. To apply that decision to the present case, when did the term of twenty-one years during which the trustees were to receive the rents and at the expiration of which they were to sell commence? Did it commence at midnight on May 12 and include May 13, the day on which the deed was executed, or did it commence at midnight on May 13, that is to say, commence only on May 14? I think it is perfectly plain on the construction of this deed that the term included May 13. The direction is that the trustees are to "stand possessed of the hereditaments and premises during the term of twenty-one years from the date of these presents upon trust out of the rents and profits thereof to pay to Ann Haigh during the said term of twenty-one years, if she shall so long live, for her separate use without power of anticipation, the annual sum of 320*l.* by equal half-yearly payments on the 13th day of May and the 13th day of November in every year"; in other words Ann Haigh having lived until midnight of November 12, 1892, would be entitled to receive her first half-yearly payment in respect of that annuity, and that

(1) 14 M. & W. 581, 582. (2) (1838) 3 M. & W. 473.
(3) (1840) 6 M. & W. 49.

could only be on the view that May 13, 1892, the day of the execution of the deed, was included in the six months during which she was regarded as entitled to her annuity; otherwise she would not on the earliest moment of November 13 have been entitled to the half-yearly payment, but only to payment for the half-year less one day. In my opinion, therefore, on the true construction of this deed "the term of twenty-one years from the date of these presents" commenced at midnight on May 12, 1892, and the expiration of that term of twenty-one years therefore happened at midnight on May 12, 1913. Consequently the trust for sale vested in the trustees was not suspended for more than a period of twenty-one years and is a valid and good trust.

There is a third point on which I do not intend to express any definite opinion because it really does not arise and I must have called upon counsel for the plaintiffs before I could have come to any decided judgment upon the point. This is a point taken by counsel for the plaintiffs, who say that, even if the trust were void as regards any trustees not in existence at the date of the settlement, it must still be a valid trust in the hands of the two original trustees because their lives were lives in being at the date of the settlement. In my opinion, as at present advised, though I do not express any decided opinion upon it, the point is a bad point with regard to a trust like the present. Whatever may be the case with regard to a mere power, with regard to a trust it seems to me that it would be extremely difficult to come to the conclusion that the trust was in any way severable. As at present advised I think that the duties attached to a trust must be indivisible and that no distinction can be drawn between these duties in the hands of the original trustees and in the hands of those who may hereafter be appointed. On the first two grounds, however, I am of opinion that the plaintiffs are entitled to succeed, and I give judgment for specific performance of the contract accordingly.

Solicitors: *Bell, Brodrick & Gray, for Thomas Robson, Pocklington; A. E. Burton, for Scatcherd, Hopkins, Middlebrooks & Brighouse, Leeds.*

A. C.

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May 20, 21.

In re FIRTH.

LOVERIDGE *v.* FIRTH.

[1914 F. 431.]

Will—Construction—Gift in Remainder to Children as a Class, but the Whole to one Child if there should be only one Child living—Survival of more than one Child—Reflecting Contingency.

Testator, who died in 1866, bequeathed to his son W. the sum of 4000*l.*, to be by him invested, in trust to pay the income to testator's daughter M. for her life, and after her death to pay the proceeds of the investments to her children, and if there should be no children of M. living at her death "then to pay over the proceeds . . . . unto the children of my said son W. in equal parts or shares, or the whole to one child, if there should be only one child living of the said W." W. died in 1903 having had eleven children, ten of whom survived him. Two other children died in 1907 and 1913, and M. died a spinster in 1914:—

Held, that all the eleven children of W. took vested interests subject only to being divested in an event which had not happened, namely, there being only one child surviving W.

Spencer v. *Bullock* (1795) 2 Ves. Jun. 687; *Cooper* v. *Macdonald* (1873) L. R. 16 Eq. 258; *Pearce* v. *Edmeades* (1838) 3 Y. & C. Ex. 246; and *Lewis* v. *Templer* (1864) 33 Beav. 625, distinguished.

The reasoning in *Templeman* v. *Warrington* (1842) 13 Sim. 267, and the opinion of Sugden, L.C. of Ireland, in *Kimberly* v. *Tew* (1843) 4 D. & War. 139, adopted by the Court.

John Firth, of Marine House, Douglas, Isle of Man, by his will, dated January 15, 1866, gave to his wife his household furniture, an annuity of 160*l.* to be paid by his children, and a legacy of 100*l.* Then the testator gave to his son William Firth the sum of 500*l.* upon certain trusts. The will then continued as follows: "I leave and bequeath unto the said William Firth the sum of 3000*l.* to be invested by him in the Six per cent. Guaranteed Stock in the Great Northern (Leeds, Bradford, and Halifax) Railway, or in such other real or personal security as he may consider best, in trust to pay over the dividends or interest to arise therefrom unto my daughter Harriett Naylor, during her life, free from the control of her present or any future husband . . . . And in further trust, upon the death of the said Harriett Naylor, to sell and dispose of the said railway stock, or realize

the securities upon which the said trust money shall have been invested, and pay the same over, in equal parts, to her children, if any there should be, or the whole to one, if only one child, and, if there should be no children of the said Harriett Naylor living at her death, then to pay over the proceeds arising from the said trust fund unto the children of my said son William Firth, and the children or child of my daughter Mary Ann Firth, if any there should be, in equal shares, subject nevertheless to the payment of the proportion of the said annuity to my said wife if she be then living. I leave and bequeath unto the said William Firth the sum of 4000*l.*, to be invested by him in the Six per cent. Guaranteed Stock in the Great Northern (Leeds, Bradford, and Halifax) Railway, or in such other real or personal security as he may consider best, In trust to pay over the dividends or interest to arise therefrom unto my daughter Mary Ann Firth, during her life, free from the control of any husband she may hereafter have . . . . And in further trust, upon the death of the said Mary Ann Firth, to sell and dispose of the said railway stock or realize the securities upon which the said trust moneys shall have been invested, and pay the same over in equal parts to her children, if any there should be, or the whole to one, if only one child, and if there should be no children of the said Mary Ann Firth living at her death, then to pay over the proceeds arising from the said trust fund unto the children of my said son William Firth in equal parts or shares, or the whole to one child if there should then be only one child living of the said William Firth."

The testator died on January 17, 1866, and his will was proved by William Firth, the sole executor.

William Firth died on December 24, 1903, having had eleven children, all of whom survived him except one, Herbert Firth, who died on November 16, 1897. Another child, Amy Blanche Firth, died on January 9, 1907, and another, Louisa E. Firth, died on February 4, 1913. Mary Ann Firth died a spinster on January 18, 1914. The other eight children of William Firth (including Annie Hay and Hester Jane Firth) survived Mary Ann Firth.

The executor of William Firth took out an originating summons

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against Hester Jane Firth, as executrix of Amy Blanche Firth, and Annie Hay, as a person beneficially interested under the testator's will, for the determination of the question (inter alia) whether, on the death of Mary Ann Firth, the corpus of the 4000*l.* became divisible into eleven shares between the surviving children and the legal personal representatives of the children who had predeceased Mary Ann Firth, or into eight shares between the eight children of William Firth who survived her.

Wright Taylor, for the plaintiff, stated the facts and the question involved.

C. Church, for the defendant Annie Hay. Only the eight children of William Firth who survived Mary Ann Firth take. Although the general rule is that where there is a gift to a class in remainder all members of the class who come into being during the continuance of the particular estate take vested interests, that rule must yield to the context: Jarman on Wills, 6th ed. p. 1389. A contrary intention is shewn in the present will. The gift of the whole to one child if there should be only one is inconsistent with a vesting before the death of Mary Ann Firth: *Spencer* v. *Bullock* (1); *Pearce* v. *Edmeades* (2); *Lewis* v. *Templer* (3); *Cooper* v. *Macdonald*. (4) The word "then" occurring after the words "if there should be no children of the said Mary Ann Firth living at her death" shews that the class is to be ascertained at Mary Ann Firth's death. The gift of the 4000*l.* is in similar words to those of the previous gift of the 3000*l.* down to a point, but the words "or the whole to one child if there should be only one child living of the said William Firth" are only to be found in the gift of the 4000*l.*, the difference in language shewing that the testator intended different results from the two gifts.

The opinion expressed by Sugden, L.C. of Ireland, in *Kimberly* v. *Tew* (5), that, as the event of one child only surviving had not occurred, the children who had died in the lifetime of the tenant for life took vested interests, was not a decision and is not binding

(1) 2 Ves. Jun. 687.
(2) 3 Y. & C. Ex. 246.
(3) 33 Beav. 625.
(4) L. R. 16 Eq. 258.
(5) 4 D. & War. 139.

on the Court. [He also referred to Theobald on Wills, 7th ed. p. 593.]

F. Whinney, for the defendant Hester Jane Firth. All the children of William Firth took vested interests, and their shares could not be divested unless he left only one child him surviving, which event did not happen: *Templeman* v. *Warrington*. (1) The law is correctly stated in the argument of Mr. Bethell in that case. The decision of Lord Selborne L.C. in *Cooper* v. *Macdonald* (2) was on a very peculiarly worded will and lays down no guiding principle; and no assistance in principle can be derived from *Lewis* v. *Templer*. (3) The only decision in *Pearce* v. *Edmeades* (4) was on the question whether the survivor of two tenants for life took the whole income after the death of the other tenant for life. The decision in *Spencer* v. *Bullock* (5) turned on the proviso and on the fact that there were already children at the date of the will. The general indication shewn by the terms of the legacy of the 3000*l.* in the present case is that a similar settlement was intended in respect of the legacy of the 4000*l.*

SARGANT J. In this case I have to decide whether, under an ultimate gift in a will of a legacy of 4000*l.* to the children of a son of the testator, named William Firth, those children only are to take who survived the period of distribution, that is, the death of an aunt, Mary Ann Firth, or whether the children who died in her lifetime took vested interests. Some reference has been made both by Mr. Whinney and Mr. Church to a previous settlement of a legacy of 3000*l.* given by the will, and I can see that possibly some argument might be founded on that legacy in favour of either contention, but I do not think it really comes to anything. On one side it is said that the general indications shewn by the settlement of the first legacy ought to lead one to presume that the same sort of settlement was intended to be effected on the second legacy; and on the other side it is said that the small differences must shew that the testator intended that a different result should be produced. I think the two

(1) 13 Sim. 267.
(2) L. R. 16 Eq. 258.
(3) 33 Beav. 625.
(4) 3 Y. & C. Ex. 246.
(5) 2 Ves. Jun. 687.

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arguments may be left to cancel one another. The interpretation of the gift of the 4000*l.* legacy is sufficiently difficult in itself, and I devote myself entirely to the trusts of that legacy.

The legacy of 4000*l.* was to go to Mary Ann Firth during her life, and then upon her death the trust was this: "In further trust, upon the death of the said Mary Ann Firth, to sell and dispose of the said railway stock or realize the securities upon which the said trust moneys shall have been invested, and pay the same over in equal parts to her children if any there should be, or the whole to one if only one child, and if there should be no children of the said Mary Ann Firth living at her death, then to pay over the proceeds arising from the said trust fund unto the children of my said son William Firth in equal parts or shares, or the whole to one child if there should then be only one child living of the said William Firth." Mary Ann Firth died without having had any children, and the state of the family of William Firth at the date of the death was that he had had eleven children, three of whom predeceased Mary Ann Firth and eight of whom survived her.

The question I have to determine is whether the fund goes in elevenths amongst the eight children and the legal personal representatives of the three children who predeceased the tenant for life, or whether it goes in eighths amongst the children who survived the tenant for life. Now the way in which it is put in favour of the children who survive is this, that although the prima facie meaning of "the children of my said son William Firth" would be all the children of William Firth whether they survived the tenant for life or not, this prima facie meaning of the word "children" has to be modified, having regard to the terms of the alternative gift of "the whole to one child if there should then be only one child living." It is said that these last words shew that the beneficiaries the testator had in view were the children of William Firth then living, and not his children generally, because it would be so extraordinarily capricious to make the interests of the children of William Firth depend upon the circumstance whether there was one child left living at the death of the tenant for life, Mary Ann Firth, for if those words were given full effect to, the result

might be that, although there might have been eleven children, as there were in this case, still if ten out of eleven had died and only one had been left, then the whole would have gone to that one; and that it is impossible to suppose that the testator could have intended that the shares should be contingent, or liable to be divested, in that one event only, and that therefore I must come to the conclusion that the gift was to a contingent class throughout.

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The point is put in Theobald on Wills, 7th ed. p. 593, in these terms:—"Reflecting contingency backwards and forwards:—If there is a gift in remainder to children, followed by a provision that if there is only one child living at the death of the tenant for life that child is to take, it has been held in some cases that the contingency attaching to a single child must be reflected back into the constitution of the original class." Then he refers on the one hand to certain cases, including the cases that have been cited to me of *Spencer* v. *Bullock* (1), *Lewis* v. *Templer* (2), and *Cooper* v. *Macdonald* (3); and he sets on the other side *Templeman* v. *Warrington* (4) and *Kimberly* v. *Tew*. (5)

As regards *Spencer* v. *Bullock* (1), I think it is sufficient to say that the words in that case were extremely special, and that the judge there laid stress not only on those special words but on the circumstances of the family, and that, while deciding that in that case the whole gift was contingent, he recognized the general rule to the contrary. Then in *Cooper* v. *Macdonald* (3) the terms of the gift were also extremely special: there was an elaborate settlement of real estate with cross-remainders, and a gift of residuary personalty upon corresponding trusts, and I do not think that any real assistance is to be derived from the terms of that will or from the decision that was given by Lord Selborne, because the whole case was such an extremely special case. I do not think the case goes any further than what is said to be the effect of it in Theobald on Wills, that the contingency "in some cases" "must be reflected back," and that of course I entirely recognize. Perhaps the main importance, for the present purpose,

(1) 2 Ves. Jun. 687.
(2) 33 Beav. 625.
(3) L. R. 16 Eq. 258.
(4) 13 Sim. 267.
(5) 4 D. & War. 139.

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of that case is that it to some extent gives sanction to a part of the reported reasons for the decision in *Pearce* v. *Edmeades*. (1) The actual decision in *Pearce* v. *Edmeades* (1) was merely as to whether one of two tenants for life took the whole property during the remainder of his lifetime after the death of the other tenant for life, and the only reason why the Court gave any indication of opinion as to the result of the ultimate gift was for the purpose of shewing that the whole estate went as one mass after the death of both tenants for life; and that would have been so whatever the construction on this point had been with reference to the persons who were ultimately to take. No doubt the terms of the judgment did indicate that the persons to take in that event would have been a class of persons surviving at the death, but that was in no way necessary to the decision. The same effect would have been produced, for the purpose of construing the gift of the life interest, if the ultimate gift had been to a class of persons composed of the children of the two tenants for life who took vested interests, and therefore it seems to me that really *Pearce* v. *Edmeades* (1) is no real authority in favour of the construction that was then indicated with regard to the ultimate takers under that particular will.

In *Lewis* v. *Templer* (2) the facts were, as it seems to me, rather different, because there were there two indications of intention that the class to take was a contingent class. The original gift had been to the six daughters of the testator or such of them as should then be living, and the children of such of them as should be dead, the children taking the parents' share. Now the fact that the daughters themselves were a contingent class was to some extent an indication that the children of the daughters might be a contingent class. Of course, if that stood by itself, the decisions are quite plain that the contingency with regard to the parents would not have been extended to their issue, but I think that the circumstance that the gifts to the parents were contingent rendered it easier, with the help of the subsequent words which implied contingency, to hold that the gift to the children of the daughters was also contingent. I think therefore that *Lewis*

(1) 3 Y. & C. Ex. 246. (2) 33 Beav. 625.

v. *Templer* (1) is not really an authority that governs this case. Then, on the other hand, the case of *Templeman* v. *Warrington* (2) is extremely like this case. The only difference in *Templeman* v. *Warrington* (2) is that the words were much more clearly divesting words in a separate limitation or gift over. To that extent the case is not absolutely on all fours with this case, but I think that in its general aspects it is extremely like it and that the reasoning of the Vice-Chancellor really applies here. He says: "The words of the last clause are the same as the words of the first down to 'share and share alike'; and, therefore, in the first instance, vested interests are given to the children by that last clause. Then the rule is not to import into an instrument more of contingency than is expressed in it; and as the event which the testatrix contemplated, namely, that there might be only one child living at the death of her niece, has not happened, I am of opinion that the vested interests which the children took were not divested by their dying in the lifetime of their mother." And although it is not a decision, the opinion expressed by Sugden L.C. in *Kimberly* v. *Tew* (3) seems to me of very great value in this case. There the words of the ultimate gift were extremely similar to the gift here. The words are (I am reading from the marginal note): "To divide the said sum, and any interest which might be due thereon, among all his children equally, and if he should leave but one, then to give the whole to said one child." That was in a gift to the children of the parent, and there Sugden L.C. clearly indicated his view that the true construction of the bequest was "a gift to the father for life, with remainder to the children as tenants in common, with a gift over, in case there should be but one surviving child, to that child." Here it is observable that in the gift to the children of Mary Ann Firth, if she had children, there is a rather capricious intention shewn. It is clear that although there is a gift over of the whole to the children of William Firth if there should be no children of Mary Ann Firth living, so that any children of Mary Ann Firth would take an interest liable to be

(1) 33 Beav. 625. (2) 13 Sim. 267, 270
(3) 4 D. & War. 139, 153.

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divested in case Mary Ann Firth did not leave any child surviving her, yet nevertheless, subject to that one contingency, the children of Mary Ann Firth would take vested interests; that is to say, supposing she had had five or six children, all those children would have taken vested interests whether they did or did not survive her, though subject to the contingency of their losing everything if no one of them survived her. That provision renders it easier to accept, as the true construction of the gift here, the somewhat capricious provision that although the children of William Firth were all to take prima facie, whether they did or did not survive William Firth, yet if there should be only one child living at William Firth's death, that child should take the whole.

It seems to me that it would be safer for me to act on the well-established rule that, prima facie, interests are to be taken to vest at as early a period as possible, and not to give to words which are substantially, as it seems to me, divesting words any further operation than is necessitated by the actual terms of the divesting provision. In my opinion, therefore, all the children of William Firth took vested interests, subject only to being divested in an event which has not happened, and the fund here is divisible in one-eleventh shares.

Solicitors for all parties: *Johnson, Weatherall & Sturt, for Wade, Tetley, Wade & Scott, Bradford.*

F. E.

In re HARRIS.
DAVIS *v.* HARRIS.

[1914 H. 340.]

SARGANT J.

1914

May 27;
June 16.

Administration — Executor's Right of Retainer — Debt arising from Breach of Trust by Testator — One Executor concurring in Breach of Trust — Another Executor appointed Trustee after Testator's Death — Right to retain against Specialty Creditors — Administration of Estates Act (Hinde Palmer's Act), 1869 (32 & 33 *Vict.* c. 46).

An executor who as co-trustee of a settlement with his testator was party to a breach of trust which he has not made good cannot exercise on behalf of his cestuis que trust a right of retainer out of the testator's estate in respect of that breach of trust; but another executor, being also a trustee of the settlement but no party to the breach of trust, can do so, even though he was not appointed a trustee until after the death of the testator.

In re Barrett (1889) 43 Ch. D. 70 followed.

Notwithstanding the earlier decisions in Courts of first instance to the contrary, the result of the Administration of Estates Act (Hinde Palmer's Act), 1869, is to enlarge an executor's right of retainer in respect of a simple contract debt so as to enable him to exercise it as against specialty creditors as well as against simple contract creditors.

The principle of the decision of the Court of Appeal in *In re Samson* [1906] 2 Ch. 584; the opinion of Neville J. in *In re Jennes* (1909) 53 Sol. J. 376; and the decision of the Irish Courts in *Olpherts* v. *Coryton* [1913] 1 I. R. 211 followed.

Wilson v. *Coxwell* (1883) 23 Ch. D. 764 and *In re Jones* (1885) 31 Ch. D. 440 not followed.

Adjourned Summons.

John Harris (hereinafter called the testator) was a solicitor practising at Birmingham. His son, Sydney Edmund Harris, was a clerk in his employment.

By an indenture dated October 23, 1876, and made between Edwin Brewer of the first part, Ellen Augusta Brewer of the second part, and T. M. V. Kidd and J. Stroud (the trustees) of the third part, a sum of 4000*l.* was settled on the trusts therein declared, the power of investment being a power to invest in parliamentary stocks or public funds or Government securities of the United Kingdom. There was no power to invest upon the security of leasehold property.

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The testator and Sydney Edmund Harris were subsequently appointed trustees of this settlement, and on October 14, 1908, they invested 2000*l.*, part of the trust funds subject to the settlement, on a mortgage of leasehold property.

The testator died on May 28, 1911, having by his will dated April 4, 1908, appointed the plaintiff and Sydney Edmund Harris to be his executors, and bequeathed the residue of his estate on trusts in favour of his widow, Florence Amelia Harris, and daughters, Amy Eleanor Harris and Doris Norah Harris.

On November 4, 1911, the plaintiff was appointed a trustee of the settlement in place of the testator jointly with Sydney Edmund Harris.

In May, 1913, the leasehold security was realized at a net loss to the trust estate of 348*l.* 15*s.* 2*d.*

The plaintiff took out this originating summons against Sydney Edmund Harris, Florence Amelia Harris, and Amy Eleanor Harris, asking that the following questions or matters arising in the administration of the testator's estate might be determined: (1.) Whether the plaintiff and the defendant Sydney Edmund Harris, as executors of the will of the testator, were entitled to retain any and what part of the testator's estate to answer the debt or sum of 348*l.* 15*s.* 2*d.* due to the plaintiff and the defendant Sydney Edmund Harris from the testator's estate in respect of the breach of trust committed by the testator and the defendant Sydney Edmund Harris as trustees of the indenture of settlement; and (2.) that the real and personal estate of the testator might be administered. The summons was afterwards amended by adding as defendants the United Counties Bank as representing simple contract creditors, and Sarah Ann Hunt, Edwin James Hunt, and Thomas William Hunt as representing specialty creditors of the testator.

The estate was stated to be insolvent.

The defendant Sydney Edmund Harris made an affidavit in which he stated that he acquiesced in the investment in question under the domination and influence of the testator, and submitted that he ought not to be held responsible for the advance as the testator was throughout the active party in the matter.

Johnston Edwards, for the plaintiff. It is the duty of the plaintiff to his cestuis que trust to exercise such right of retainer as he may possess. It is submitted that the two executors, or at any rate the plaintiff, who was no party to the breach of trust, can exercise the right of retainer, and it makes no difference that the plaintiff only became a trustee of the settlement after the date of the testator's death: *Davies* v. *Parry* (1); *In re Benett.* (2) *Jones* v. *Evans* (3) is no authority to the contrary and is explained by Romer J. in *Davies* v. *Parry.* (1)

Owen Thompson, for the defendant Sydney Edmund Harris. There is a clear right of retainer in this defendant unless it is affected by his being a party to the breach of trust. It is submitted that he was not primarily liable for the breach of trust and as between himself and the testator was entitled to be indemnified out of the testator's estate, and that the fact that he was a party to the breach of trust does not affect his right of retainer under the circumstances. [He referred to Lewin on Trusts, 12th ed. p. 1070; *In re Benett*, per Stirling L.J. (4)]

A further question may arise whether the executors' right of retainer is exercisable against specialty as well as simple contract creditors. The decision of the Court of Appeal in *In re Samson* (5) shews that the effect of Hinde Palmer's Act, 1869 (6) —putting simple contract and specialty creditors on the same footing in administration—is to extend the executor's right of retainer though the Court did not decide the point. Neville J.

(1) [1899] 1 Ch. 602.
(2) [1906] 1 Ch. 216.
(3) (1876) 2 Ch. D. 420.
(4) [1906] 1 Ch. 230, 231.
(5) [1906] 2 Ch. 584.
(6) Administration of Estates Act (Hinde Palmer's Act), 1869, s. 1:

"In the administration of the estate of every person who shall die on or after the 1st day of January 1870 no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding: Provided always, that this Act shall not prejudice or affect any lien, charge, or other security which any creditor may hold or be entitled to for the payment of his debt."

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was of the same opinion in *In re Jennes* (1), and in the recent Irish case of *Olpherts* v. *Coryton* (2) Barton J. so decided.

P. Lloyd-Greame, for simple contract creditors. There is no right of retainer under the circumstances in either executor. As regards the defendant Sydney Edmund Harris, he was a concurring party in the breach of trust with full knowledge of the circumstances and could not himself claim any indemnity from the testator: *Bahin* v. *Hughes* (3); *Robinson* v. *Harkin* (4); and he could only have sued the testator on the terms of having first made good the breach of trust—*In re Beavan* (5)—which he has not done and has no prospect of doing. As regards the plaintiff, he only became a trustee of the settlement after the testator's death and is equally unable to retain. To enable an executor to exercise the right of retainer the obligation to pay to the executor must exist at the date of the testator's death. If the Court is against me on this point I support the view that *In re Samson* (6) has extended the right of retainer and ask the Court to follow the principle laid down in that case and to depart from the earlier decisions.

G. E. Tyrrell, for specialty creditors. It has been frequently decided that the Act of 1869 does not give an executor the right to retain a simple contract debt against specialty creditors: *Wilson* v. *Coxwell* (7); *In re Jones.* (8) In *In re Samson* (6) the Court of Appeal refused to decide the point, and in *In re Jennes* (1) Neville J. followed the earlier decisions.

Johnston Edwards, in reply, referred to *In re Giles* (9) and *In re Orme.* (10)

Cur. adv. vult.

June 16. SARGANT J. delivered the following written judgment:—This summons raises the question whether the plaintiff and the defendant Sydney Edmund Harris, as the executors of the testator, can retain out of his estate a debt of 348*l.* 15*s.* 2*d.* in respect of a breach of trust committed by the testator and the

(1) 53 Sol. J. 376.
(2) [1913] 1 I. R. 211.
(3) (1886) 31 Ch. D. 390.
(4) [1896] 2 Ch. 415, 425.
(5) [1913] 2 Ch. 595.
(6) [1906] 2 Ch. 584.
(7) 23 Ch. D. 764.
(8) 31 Ch. D. 440.
(9) [1896] 1 Ch. 956.
(10) (1883) 50 L. T. 51.

defendant Sydney Edmund Harris as trustees of an indenture dated October 23, 1876, hereinafter referred to as Brewer's settlement. If this debt or any part of it can be retained, a further question arises whether it can be retained against specialty debts or only against simple contract debts. The defendants Florence Amelia Harris and Amy Eleanor Harris represent the residue, but are really not interested in the matter as the estate is admittedly insolvent. The defendants the United Counties Bank represent simple contract creditors. The defendants Sarah Ann Hunt, Edwin James Hunt, and Thomas William Hunt represent special contract creditors.

It appears that in the year 1908 the testator and the defendant Sydney Edmund Harris were trustees of Brewer's settlement, and in that capacity committed an undoubted breach of trust by advancing part of the trust funds on a mortgage of leaseholds without any special power for that purpose. The debt in question is the loss arising from that breach of trust. It has been sought in the evidence of the defendant Sydney Edmund Harris to establish that the relations between him and the testator (who was his father and employer) were such that the pecuniary liability for the breach of trust rested solely on the testator, and that as between the testator and the defendant Sydney Edmund Harris the latter was entitled to be indemnified. But I am unable to take this view of the facts, and consider that there is not sufficient to displace the prima facie rule that the testator and the defendant Sydney Edmund Harris were jointly and severally liable for the consequences of the breach of trust. After the breach of trust, but before any liability in respect of it had been established, namely, on May 28, 1911, the testator died, and his will was proved on July 7, 1911, by the plaintiff and the defendant Sydney Edmund Harris. On November 4, 1911, the plaintiff was appointed a trustee of Brewer's settlement in the place of the testator and jointly with the defendant Sydney Edmund Harris. The plaintiff and the defendant Sydney Edmund Harris desire to retain if they have the right to do so.

The legal principles generally applicable to cases of this kind are well settled. A legal personal representative can before an administration by the Court prefer one creditor to others, and

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being debarred from suing himself can give himself a preference by way of retainer; and, further, this right of retainer extends to equitable debts and liabilities which are ascertained and become debts after the death and prior to the claim to retain, and can be exercised in respect of debts owing to the legal personal representative or to one of several legal personal representatives as a trustee for others and for debts so owing to him as one of several trustees. Accordingly, if the testator had been solely responsible for the breach of trust in question and there had been associated with him in the trusteeship prior to his death both or either of the defendant Sydney Edmund Harris and the plaintiff, the right of retainer would have arisen; and again, the result would have been the same had the facts been precisely as they are except that the plaintiff had been appointed a trustee in the place of the testator jointly with the defendant Sydney Edmund Harris immediately before the death of the testator. In any of these cases one or more of the legal personal representatives of the testator would have prior to his death become entitled to a joint and several claim against him on behalf of other persons which subsequently matured into and became represented by the debt of 348*l.* 15*s.* 2*d.* in question. The exceptional circumstances here, and those which give rise to the whole of the difficulty, are, first, that as regards the defendant Sydney Edmund Harris, he was a joint wrong-doer with the testator, and, secondly, that as regards the plaintiff, it was only after the testator's death that he was appointed a trustee of Brewer's settlement and became an assignee of the equitable claim in question. I will consider these two objections separately.

As regards the defendant Sydney Edmund Harris, it is reasonably clear that as one of the two persons guilty of the breach of trust he would be debarred from suing the testator in his lifetime or any legal personal representative of the testator after his death for damages occasioned by the joint tort. Nor do I see how the beneficiaries claiming through him can be in any better position. The right of retainer is a personal one—personal, that is, to the trustee; and though equity may go so far as to allow beneficiaries to receive and indeed insist on the benefit of such legal right in this respect as their trustee may have, it would be a very different

thing to hold that they may actually have a better right of the kind than their trustee. No doubt the defendant Sydney Edmund Harris on making good the breach of trust might be entitled to get contribution to the extent of one half from the testator's estate, and this right is one of which the beneficiaries might probably avail themselves through him; but I am told that he is quite impecunious and unable to do anything of the kind. And the recent decision of Neville J. in *In re Beavan* (1) shews that a mere right of this kind does not prior to and apart from actual payment place a legal personal representative in a position to exercise his right of retainer. Indeed I have heard no argument to establish the right of the executors to retain in respect of half the loss in question. What is claimed is the right to retain the whole loss.

There have indeed been cases, such as *Sander* v. *Heathfield* (2) and *In re Faithfull* (3), in which, when a sole trustee has been in default and his legal personal representative has as such become the new trustee, it has been held that he may if he chooses retain assets against the trust liability to the prejudice of the other creditors; and if precisely the same point arose here I should probably be forced to follow those cases, though in *In re Faithfull* (3) Chitty J. followed the decision of Malins V.-C. in *Sander* v. *Heathfield* (2) with obvious reluctance, and though the judgment of Stirling L.J. in *In re Benett* (4), while recognizing those cases in terms, does in fact, by negativing the duty of the legal personal representative to retain, very much weaken the case for allowing him the right of retainer. But in my opinion those two cases are distinguishable from the present case. There the legal personal representative, who became the new trustee, was himself an innocent person against whom no personal disqualification could be set up when he came to enforce liability in right of his position as a trustee. Here, on the contrary, the defendant Sydney Edmund Harris is subject to an express and obvious disability in relation to the very matter from which the liability arises.

I have still to consider the claim to retain through and

(1) [1913] 2 Ch. 595.
(2) (1874) L. R. 19 Eq. 21.
(3) (1887) 57 L. T. 14.
(4) [1906] 1 Ch. 216.

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in right of the plaintiff. It is said that inasmuch as he only became entitled to enforce payment of the debt after the death of the testator and by an entirely independent title, namely, by his subsequent appointment as a trustee of Brewer's settlement, he is not entitled to such right of retainer as he would have had in the event of his having been a trustee prior to the death. And it is observable that to allow him to retain would effect a considerable variation in the rights of the persons claiming in the administration of the estate of the testator by reason of a devolution of title happening subsequent to his death, and would enable a preference to be given in many cases to cestuis que trust of a testator or intestate by the device of appointing his legal personal representative or one of them a trustee of any trust instrument under which the testator was an actual or prospective debtor. Further, the case of *Jones* v. *Evans* (1) appears to lend considerable support to this contention, at any rate at first sight. On the other hand, the reason given for allowing the right of retainer (namely, right to prefer coupled with inability to sue) appears to be nearly though not quite as applicable to cases where debts of a testator accrue to a legal personal representative after the death as to cases where they accrue prior to the death; and when *Jones* v. *Evans* (1) is more carefully examined it would seem that the very short judgment of Hall V.-C. proceeds mainly on the circumstance that the debt there came to the executrix not in its original condition but after the creditor had commuted his rights in respect of it into a proof. Of still more importance is the fact that in *In re Barrett* (2) this very point was expressly decided by North J. in favour of the right of retainer. There an executrix after the death of a testator, and indeed after an order for accounts, which did not, however, amount to a judgment for administration, was appointed trustee of a settlement and became entitled in that capacity to a debt due from her testator's estate. North J. held that she was entitled to apply the balance of the testator's estate in part satisfaction of that debt though other debts were unpaid, and this although *Jones* v. *Evans* (1) was cited by him in the course of the argument as apparently tending against retainer.

(1) 2 Ch. D. 420. (2) 43 Ch. D. 70.

The fact that in that case the retainer was by a sole executrix in her right as a sole trustee while here the claim is by one of two executors to retain in his right as one of two trustees seems to me immaterial for the present purpose. *In re Barrett* (1) has never, so far as I know, been adversely criticized, and on the whole I feel bound, though with reluctance, to follow an authority which is in all material respects on all fours with the present case, and which moreover does not appear to me to be necessarily in conflict with the principle on which the right of retainer is stated to be founded.

On the view which I have taken it now becomes necessary for me to decide whether the right of retainer is available against simple contract creditors only or against specialty creditors also. It has repeatedly been held in Courts of first instance that Hinde Palmer's Act, though putting simple contract creditors and specialty creditors on one footing in administration, could not have been intended—and has not in fact operated—to enlarge the right of retainer of legal personal representatives; and had the matter rested in the position in which it stood some ten years back it would probably have been necessary simply to follow these previous decisions. But the decision of the Court of Appeal in *In re Samson* (2), though only dealing in terms with an executor's right of preference and expressly reserving the question of retainer, does in my judgment indicate (as is clearly pointed out by Neville J. in *In re Jennes* (3)) that the executor's right of retainer must also have been enlarged by the Act. It is true that Neville J., though expressly stating this view, thought it safer to follow the previous decisions. But since then there has been a judgment of the Irish Courts in *Olpherts* v. *Coryton* (4) entirely approving and following the opinion of Neville J. and expressly deciding in favour of the enlargement of the right of retainer; and on the whole I think the time has now come when even in Courts of first instance it is proper to deal with the matter afresh and on principle and to hold that the necessary though unexpected result of the provisions of Hinde Palmer's Act has been to enlarge an executor's right of

(1) 43 Ch. D. 70.
(2) [1906] 2 Ch. 584.
(3) 53 Sol. J. 376.
(4) [1913] 1 I. R. 211.

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retainer in respect of a simple contract debt by enlarging the class of debts with which that debt competes and over which it may accordingly be given a preference.

I propose, therefore, to declare that the executors of the testator are entitled to retain out of his legal assets to answer the debt of 348*l.* 15*s.* 2*d.* in question both as against simple contract creditors and as against specialty creditors. But I need hardly say that I give this decision with the greatest reluctance, and should be extremely glad if a higher tribunal less fettered by authority could see its way to come to a different conclusion. The costs of all parties other than the defendant Sydney Edmund Harris as between solicitor and client will be retained and paid by the executors out of the estate.

Solicitors : *H. G. Kenyon, for Reece, Harris & Ward, Birmingham ; Merrimans & Thirlby, for G. Pearsall Locker, Birmingham ; Timbrell & Deighton, for Shakespeare & Vernon, Birmingham ; Field, Roscoe & Co., for Pinsent & Co., Birmingham.*

A. C.

A. G. SPALDING *v.* A. W. GAMAGE, LIMITED.

SARGANT J.

1914

June 24, 25.

[1912 A. 1213.]

Practice—Taxation of Costs—Two Defendants appearing by same Solicitor—Separate Defences and Leading Counsel—Discretion of Taxing Master—Rules of the Supreme Court, 1883, *Order* LXV., *r.* 27, *sub-r.* 8.

The expression "other proceedings" in Order LXV., r. 27, sub-r. 8, includes the trial of the action and is not limited to interlocutory proceedings; but the question whether two or more defendants appearing by the same solicitor should be allowed the costs of separate defences and of separate counsel at the trial is not by sub-r. 8 made a matter purely within the taxing Master's discretion, but is open to review by the Court.

Ager v. *Blacklock & Co.* (1887) 56 L. T. 890 followed in preference to *Beattie* v. *Lord Ebury* [1873] W. N. 194; 29 L. T. 419.

Boswell v. *Coaks* (1887) 36 Ch. D. 444 distinguished.

ADJOURNED SUMMONS to review taxation.

This action was originally brought on August 30, 1912, against A. W. Gamage alone, claiming an injunction to restrain them from selling, advertising, offering for sale, or supplying footballs other than the plaintiffs' "Improved Orb" or "Specially tested Orb" footballs as and for the plaintiffs' "Improved Orb" or "Specially tested Orb" footballs, and damages. On October 20, 1912, the defendants Benetfink & Co., Limited, a company in which A. W. Gamage held some three fourths of the share capital and a controlling interest, were added as defendants, and the injunction and damages were claimed against both defendants. Both defendants appeared by the same solicitors, but put in separate defences and employed separate leading counsel at the trial. Sargant J. decided in favour of the plaintiffs, and granted an injunction together with an inquiry as to damages. The defendants appealed, appearing on the appeal by the same counsel, and the Court of Appeal reversed the decision of Sargant J. and dismissed the action with costs in the Court below and in the Appeal Court. (1) On the taxation of the costs in the Court below the taxing Master, after considering certain objections carried in by the plaintiffs, disallowed the costs of the

(1) See *A. G. Spalding* v. *A. W. Gamage, Limited* [1914] W. N. 86,

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separate defence put in by the defendants Benetfink & Co. and the employment by them of separate counsel, for the reason that the two companies were practically identical, and that under the circumstances they should have joined in the same defence.

The defendants then carried in counter-objections to the taxation as follows :—

"The defendants object to the disallowance of the items referred to on the ground that the two defendants are separate and distinct companies and that the severance of the defence of the defendants Benetfink & Co. and their separate representation at the trial were necessary and proper steps for their protection in the circumstances of the case. The defendant companies, A. W. Gamage and Benetfink & Co., are separate companies and separate and distinct entities, although A. W. Gamage have a controlling interest in Benetfink & Co. by reason of the fact that they hold upwards of three fourths of the issued capital. Other persons and trade firms are shareholders in Benetfink & Co. and have substantial holdings.

"Had Benetfink & Co. appeared in this action by a separate solicitor it could not be contended they were not entitled to all their costs under the order of the Court of Appeal herein. Prima facie Benetfink & Co. are entitled to their costs (being the items disallowed by the taxing Master) and the onus is on the plaintiffs to shew that the case is within the terms of Order LXV., r. 27, sub-r. 8.

"The action was divided into two separate parts—first the case based on the newspaper advertisements which were complained of, and secondly the case based upon actual passing off and incidents in the shops of the different defendants alleged to amount to passing off. As regards the first part the common case of both defendants was that the newspaper advertisements were not actionable, and the separate case of Benetfink & Co. was that they were not responsible for the advertisements or their consequences. This latter defence failed before Mr. Justice Sargant and was not argued in the Court of Appeal, but it was their substantial independent defence and it could not have been properly or conveniently argued together with the defence of A. W. Gamage.

"As regards the second part of the case the incidents affecting the two defendants were wholly distinct and it might well have been necessary or prudent for the counsel representing them to take distinct and even inconsistent lines in dealing with the evidence of the plaintiffs.

"In any case Benetfink & Co. were advised by counsel that they should deliver a separate defence and be separately represented at the trial and it was a reasonable precaution for them to adopt and act upon such advice."

In answer to these counter-objections the taxing Master stated his reasons for the disallowance as follows:

"Messrs. Gamage in their advertisements describe Messrs. Benetfink as their City depot. See advertisement herewith. And at the meeting of Gamages the chairman referred to the profits of their City branch Benetfinks. I have come to the conclusion that as the parties are practically identical and the defences practically identical, separate defences and a separate leader should not be allowed; and these objections are therefore overruled."

The defendants Benetfink & Co. then took out this summons asking that the defendants' counter-objections might be allowed and that it might be referred back to the taxing Master to vary his certificate accordingly.

Romer, K.C., and *D. M. Kerly*, for the summons. The taxing Master has proceeded on a wrong principle. The two companies are distinct legal entities, and the possible divergence of the two defences was such that they were justified in putting in separate defences and retaining separate counsel. It is said that this is a case within Order LXV., r. 27, sub-r. 8 (1), and that the Court has no power to review the taxing Master's discretion on the subject;

(1) Order LXV., r. 27, sub-r. 8: "Where the same solicitor is employed for two or more defendants, and separate pleadings are delivered or other proceedings had by or for wo or more such defendants separately, the taxing officer shall consider in the taxation of such solicitor's bill of costs, either between party and party or between solicitor and client, whether such separate pleadings or other proceedings were necessary or proper, and if he is of opinion that any part of the costs occasioned thereby has been unnecessarily or improperly incurred, the same shall be disallowed."

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but *Ager* v. *Blacklock & Co.* (1) is a direct decision by Kekewich J. to shew that the Court can review the taxation in a proper case notwithstanding that the case falls under this sub-rule. It is true that in *Beattie* v. *Lord Ebury* (2) Bacon V.-C. appears to have considered that the Court could not review the taxing Master's discretion under the corresponding r. 12 of Order XL. of the old Consolidated Orders in Chancery; but that case related only to the costs of a separate answer under the old practice of bill and answer. The case of *Boswell* v. *Coaks* (3) is distinguishable since in that case the House of Lords had in terms delegated its own discretion over the costs to the taxing Master and it is not a decision on sub-r. 8 of r. 27. It is submitted, moreover, that sub-r. 8 was never intended to apply to the whole costs of the action when ordered to be paid by one party to the other. The expression "other proceedings had" refers more appropriately to interlocutory steps in an action rather than to the trial. [They also referred to Order LXV., r. 27, sub-rr. 39 to 41.]

Martelli, K.C., and *A. F. Topham*, for the plaintiffs. The taxing Master exercised his discretion rightly under the circumstances. We agree that the fair test to apply is whether there was a reasonable probability of there being a substantial difference between the two defences at the trial, and judged by that test we submit that the taxing Master was right. In any case Order LXV., r. 27, sub-r. 8, applies, and the taxing Master's discretion under sub-r. 8 is not open to review: *Beattie* v. *Lord Ebury*. (2) The report of *Ager* v. *Blacklock & Co.* (1) is not satisfactory, there being no reference to sub-r. 8, and that decision should not be followed. The observations of North J. and Cotton L.J. in *Boswell* v. *Coaks* (3) are in our favour.

Romer, K.C., in reply.

SARGANT J. This is a summons asking that certain counter-objections by the defendants to a taxation of costs in the action may be allowed and that it may be referred back to the taxing Master to vary the certificate accordingly. The matter arises in

(1) 56 L. T. 890.
(2) [1873] W. N. 194; 29 L. T. 419.
(3) 36 Ch. D. 444.

this way. [His Lordship stated the facts and read the taxing Master's reasons and continued:] With regard to the practical identity of the defendants it seems to me that the taxing Master must have been adopting the view put before him on behalf of the plaintiffs that by reason of the identity of the holding of the share capital in the two companies the two defendants were to be treated as substantially one entity, although I am not in the least suggesting that the taxing Master meant to say that they were the same entity in point of law. The facts appear to be that A. W. Gamage hold a controlling interest, that is to say, more than three fourths of the share capital in Benetfink & Co., but to my mind that makes very little difference. I have to consider at any rate the shareholders who hold the remaining portion of the capital of Benetfink & Co., and I can imagine that when the two concerns are being carried on under different names, it may be of great importance to the undertaking carried on under the name of Benetfink & Co. that they should not be held liable in an action of this kind, although at the same time A. W. Gamage should be held liable. With regard to that portion of the taxing Master's reasons it seems to me that he has allowed certain considerations to influence him which should not have been allowed to influence him.

Then I come to the more important question whether the defences of Benetfink & Co. and A. W. Gamage were practically identical, because, even though the parties were not practically identical, still, if I thought that the defences were practically identical, I should hold under the circumstances that they were not entitled to put in separate defences or to appear separately at the trial. [His Lordship considered the facts and came to the conclusion that there was a reasonable probability that at the trial the case of Benetfink & Co. would be in one or more respects substantially different from the case of A. W. Gamage, and continued:] Taking that view of the case I am of opinion that the two defendants were entitled to put in separate defences; and if the matter lay with me I should come to the conclusion that they were well advised in so doing. It is extremely awkward for counsel when the cases of two sets of defendants are at all different to throw themselves first into the

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defence of one set of defendants, and afterwards into that of the other set of defendants, although there may not be any material incompatibility between them. I am relieved, however, from pursuing that subject because Mr. Martelli on behalf of the plaintiffs admitted that for the purposes of the problem which I have to consider the question is whether there was a reasonable probability of there being a substantial difference in the two defences, and in my opinion there was.

Then arises a more important general question whether this is a case in which I am entitled to review the taxation of the taxing Master, or whether it is a case in which he has such a discretion that I am precluded from reviewing it. The terms of sub-r. 8 are these. [His Lordship read the sub-rule and continued:] Mr. Kerly on behalf of the defendants has contended that this sub-rule does not apply to a case which involves the whole costs of the action when ordered to be paid by one party to the other. He says that, in view of the decision of the Court of Appeal dismissing this action with costs, it was not open to the taxing Master to disallow altogether the bill of costs of one set of defendants unless some special direction to that effect had been given by the Court of Appeal. He says that the sub-rule only applies to interlocutory proceedings in the course of an action and not to the defence at the trial. I see no reason for so limiting the general effect of the sub-rule, at any rate no fresh reason arising since the decisions to which I am about to refer, and I hold that the sub-rule is one which is applicable to the present case. But is the taxing Master under that sub-rule the sole judge? Has he such a discretion that it is not open to review? On that point three cases have been cited to me, one—*Beattie* v. *Lord Ebury* (1)—a case under the old practice of bill and answer decided in 1873, in which Bacon V.-C. undoubtedly came to the conclusion that the discretion was thrown on the taxing Master, and that the Court could not interfere with the exercise of that discretion. The matter afterwards came before Kekewich J. in *Ager* v. *Blacklock & Co.* (2), a case in which the defendants had joined in a statement of defence and afterwards had appeared separately at

(1) [1873] W. N. 194; 29 L. T. 419. (2) 56 L. T. 890.

the trial, so that it was a stronger case than the present in favour of the disallowance of separate sets of costs. The action was brought against printers and publishers, and Kekewich J. held that the matter was not one purely in the taxing Master's discretion and came to the conclusion that the defences of the two defendants were so separate in principle that two sets of costs ought to be allowed, and held that he was entitled as a question of principle to overrule the decision of the taxing Master and make an order accordingly under which both sets of defendants would get their costs.

The only other authority is the well-known case of *Boswell* v. *Coaks* (1), where the House of Lords, in allowing an appeal from the Court of Appeal and reaffirming the judgment of Fry J., made a special order that "in taxing the costs below, both in the High Court of Justice and in the Court of Appeal, the taxing Master do consider whether any of the defendants in the cause who appeared separately had sufficient reason for severing in their defences, and if and in so far as it shall appear that they had not, then the said taxing Master shall allow only one set of costs, or only as many sets of costs as he shall think right." The taxing Master allowed six separate sets of costs to six separate defendants, and on a summons to review the taxation North J. held that there was no appeal from the discretion of the taxing Master. It was held, on appeal to the Court of Appeal, that as the House of Lords had delegated to the taxing Master the decision of the question how many sets of costs should be allowed, no appeal would lie from his decision unless he altogether omitted to exercise his discretion. In my opinion that decision was not a decision at all upon the terms of the sub-rule now in question. It was a decision upon the meaning of the special order made by the House of Lords in that particular case, and the reason for the decision is perhaps most neatly put in an interlocutory observation of Bowen L.J. (2), where he says, "Has not the House of Lords delegated its jurisdiction as to costs to the taxing Master?" That being so, I prefer to follow the decision of Kekewich J. in *Ager* v. *Blacklock & Co.* (3) as against the

(1) 36 Ch. D. 444.
(2) 36 Ch. D. 451.
(3) 56 L. T. 890.

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decision of Bacon V.-C. in *Beattie* v. *Lord Ebury*. (1) Taking, as I do, the view that the case is one not purely for the discretion of the taxing Master, but that I have power to review the taxation under sub-r. 41 of r. 27 of Order LXV., and coming, as I do, to the conclusion that no importance is to be attached to the fact that the share capital of Benetfink & Co. is very largely held by A. W. Gamage, and also holding as a matter of fact that there were sufficient reasonable grounds for thinking that there would be a divergence between the defences of the two defendants at the trial on material points, I am of opinion that the decision of the taxing Master to strike out altogether the items referring to the separate costs of Benetfink & Co. cannot be sustained, and that the matter should be referred back to him to be reviewed in the light of the judgment which I have pronounced.

Solicitors: *Ward, Perks & Terry; Lawrance, Webster, Messer & Nicholls.*

(1) [1873] W. N. 194; 29 L. T. 419.

A. C.

ASTBURY J
1914
July 2.

In re BRIGGS.
RICHARDSON *v.* BANTOFT.

[1914 B. 1154.]

Will—Construction—Trust for Sale and Conversion—Direction to Trustees to Pay "all death duties" out of Residue — Previous Settlement on Daughter's Marriage—Fund secured by Testator's Covenant and Charge —Duties on Settled Fund—Settlement Estate Duty—Succession Duty—Rateable Part of Estate Duty—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 14, *sub-s.* 1.

A fund payable at a testator's death to the trustee of his daughter's marriage settlement dated September 29, 1884, was secured by the testator's covenant in the settlement and by a contemporaneous mortgage of real estate.

By his will dated April 29, 1908, the testator devised and bequeathed his residuary real and personal estate to his trustees on trust for sale and conversion and directed them to pay "all death duties" out of the proceeds.

The testator died on August 21, 1913:—

Held, that the expression "all death duties" referred to duties to which the testator's estate became liable under the dispositions of his will, and did not include duties arising under the settlement, and really payable by or recoverable from the settlement trustee.

The settlement estate duty and succession duty on the settled fund, and the rateable part of the estate duty apportionable thereon under the Finance Act, 1894, s. 14, sub-s. 1, must therefore be borne by that fund.

In re Pimm [1904] 2 Ch. 345 and *In re Hartland* [1911] 1 Ch. 459 applied.

ORIGINATING SUMMONS.

By an ante-nuptial settlement dated September 29, 1884, and made between the wife's father, hereinafter called the testator, of the first part, the wife of the second part, the husband of the third part, and the trustees of the fourth part, after reciting an agreement by the testator to enter into covenants to pay the wife 200*l.* a year during their joint lives and before the expiration of six months after his decease to pay the trustees 15,000*l.* with interest at 4 per cent. from his decease, which sum of 15,000*l.* with interest was to be charged upon his Towthorpe estate, and after reciting a mortgage of even date in that behalf, the testator covenanted to pay the wife 200*l.* a year during their joint lives, and that he

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would during his life or before the expiration of six months from his decease pay the trustees 15,000*l.* with interest at 4 per cent. from his decease (if not paid in his lifetime). The trustees were to hold the said sum of 15,000*l.* upon trust for the testator for life and after his decease upon trust for the wife, husband, and children as therein declared.

By the mortgage of even date made between the testator of the one part and the trustees of the other part the testator in consideration of the intended marriage conveyed the Towthorpe estate to the trustees and their heirs to the use of the testator for life and after his decease to the use of the trustees in fee simple upon trust by sale or mortgage of the said hereditaments to raise the sum of 15,000*l.* with interest at 4 per cent. from the testator's decease and to hold the said sum of 15,000*l.* and interest upon the trusts of the settlement and subject thereto to hold the said hereditaments in trust for the testator, his heirs and assigns.

The said sum of 15,000*l.* was not paid in the testator's lifetime.

By his will dated April 29, 1908, the testator, after devising a house in favour of his son for life and bequeathing a trust legacy of 15,000*l.* in favour of his other daughter and her children, devised and bequeathed his residuary real and personal estate to his executors and trustees on trust for sale and conversion and directed them out of the proceeds to pay "my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil hereto and all death duties" and to hold the residue upon the trusts therein declared.

The testator died on August 21, 1913.

On April 6, 1914, this summons was issued to determine (inter alia) whether the rateable part of the estate duty on the Towthorpe estate apportionable under the Finance Act, 1894, s. 14, sub-s. 1, in respect of the 15,000*l.* charge and the settlement estate duty and succession duty on that 15,000*l.* were payable out of that sum or out of residue.

A question was also raised as to the estate duty, settlement estate duty, and succession duty payable in respect of the 15,000*l.* trust legacy to the testator's other daughter, but at

the hearing it was admitted that these duties were payable out of residue.

Alfred Adams, for the trustees of the will, one of whom was the surviving trustee of the settlement.

P. F. Stokes and *Fairfax Luxmoore*, for beneficiaries under the settlement. Apart from the special direction to pay "all death duties" out of residue the position would have been as follows. As devisees in trust the will trustees were accountable for estate duty on the whole Towthorpe estate. They could not deduct the 15,000*l.* debt because it was not incurred for money's worth: Finance Act, 1894, s. 7, sub-s. 1. They were also accountable for the settlement estate duty on the 15,000*l.* part of that estate as a further estate duty under s. 5, and they were also accountable for the succession duty under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 44.

The question of incidence next arises. The settlement estate duty and succession duty would clearly have been borne by the settled fund, and as that fund was charged on the Towthorpe estate the will trustees could have recovered a rateable part of the estate duty from the settlement trustee under s. 14, sub-s. 1. (1)

With full knowledge of this the testator directs that "all death duties" are to be paid out of residue. This direction is sufficient to change the prima facie incidence and to throw these death duties on residue. A covenant in a settlement to pay 25,000*l.* "without any deduction" excludes s. 14, sub-s. 1: *In re Maryon-Wilson.* (2)

[ASTBURY J. That was an express provision to the contrary in the settlement.]

In the construction of directions for payment of duties out of residue or out of a specific fund it has been held

(1) Sect. 14, sub-s. 1: "In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorised or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property, (whether as capital or as an annuity or otherwise,) under a disposition not containing any express provision to the contrary."

(2) [1900] 1 Ch. 565.

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that "estate duty" includes "settlement estate duty": *In re Leveridge* (1); "duties" include estate duty and settlement estate duty: *In re Pimm* (2); and "death duties" include estate duty and settlement estate duty: *In re Cayley.* (3) A direction to pay settled legacies free from duty covers settlement estate duty: *In re Turnbull.* (4) In common parlance "death duties" also include legacy and succession duty, and this view is adopted in the definition of "death duties" in the Finance Act, 1894, s. 13, sub-s. 3.

D. D. Robertson and *Owen Thompson*, for residuary legatees. Apart from the special direction to pay "all death duties" out of residue the present case so far as regards estate duty would be indistinguishable from *In re Hartland.* (5) A rateable part of the estate duty would be borne by the settled fund under s. 14, sub-s. 1, and the whole settlement estate duty and succession duty would clearly fall thereon. Now "death duties" no doubt include estate duty, settlement estate duty, and succession duty, but the direction to pay death duties out of residue only extends to duties arising under the provisions of the will: *In re Pimm.* (2) In *In re Leveridge* (1), *In re Pimm* (2), *In re Cayley* (3), and *In re Turnbull* (4) the duties in question all arose under the provisions of the will, so that those cases are distinguishable. In the present case the duties arise wholly under the settlement and mortgage. The settlement estate duty and succession duty are payable by the settlement trustee, and there is nothing in the deeds to exclude s. 14, sub-s. 1, as to the rateable part of the estate duty. The devisees in trust really take no more than the equity of redemption of the Towthorpe estate, and the payment by them of estate duty on the whole estate in the first instance is mere machinery for purposes of collection.

P. F. Stokes in reply. The devisees in trust have to pay the whole estate duty on the Towthorpe estate—*In re Hacket* (6)—and they are accountable for the settlement estate duty and succession duty on the 15,000*l.* charge thereon. That obligation clearly arises from a disposition in the will, if that is necessary

(1) [1901] 2 Ch. 830.
(2) [1904] 2 Ch. 345, 347.
(3) [1904] 2 Ch. 781.
(4) [1905] 1 Ch. 726.
(5) [1911] 1 Ch. 459.
(6) [1907] 1 Ch. 385.

to bring these duties within the specific direction for payment out of residue. But in this case it is not necessary. In *In re Pimm* (1) the direction was to pay "my duties" and the remarks of Farwell J. were addressed to those words. In the present case the direction is to pay "all death duties." Surely that is intended to include all duties arising on the testator's death under any disposition made by him, whether by deed or will. Unless this is so the 15,000*l.* settled by deed on one daughter is in a worse position than the 15,000*l.* settled by will on the other daughter. This cannot have been the testator's intention.

ASTBURY J. (after stating the facts). The question is whether the direction to pay all death duties out of residue includes the rateable part of the estate duty on the Towthorpe estate apportionable in respect of the 15,000*l.* charge thereon, and also the settlement estate duty and succession duty in respect of that 15,000*l.* In other words the question is whether these duties are to be borne by the settled fund or residue.

In *In re Hartland* (2) a sum payable to the trustees of a marriage settlement on the death of the wife's father with interim interest during his life was secured by his covenant in the settlement and by an equitable charge on real estate. There was no money consideration for the covenant or charge, so that on the covenantor's death estate duty became payable thereon. Swinfen Eady J. held that s. 14, sub-s. 1, of the Finance Act, 1894, was applicable and consequently that the settlement trustees must pay the proper rateable part of the estate duty in respect of the property comprised in their security.

As regards estate duty it is therefore clear that apart from the direction in the will to pay "all death duties" out of residue the rateable part of the estate duty on the Towthorpe estate apportionable in respect of the 15,000*l.* charge would be recoverable by the will trustees from the settlement trustee under s. 14, sub-s. 1, there being no express provision to the contrary in the settlement or mortgage.

The question therefore is whether the direction in the will to

(1) [1904] 2 Ch. 345, 347. (2) [1911] 1 Ch. 459.

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pay "all death duties" out of residue includes the rateable part of the estate duty recoverable from the settlement trustee under s. 14, sub-s. 1, or whether it only includes the portion of estate duty that is not so recoverable.

In *In re Pimm* (1) a testator, who died in 1903, after making pecuniary bequests and devising certain freeholds upon trusts by way of settlement, devised and bequeathed the residue of his real and personal estate upon trust for sale and conversion, and directed his debts, funeral and testamentary expenses, and duties to be paid out of the proceeds of such sale and conversion. Farwell J. held that the settlement estate duty as well as the estate duty payable in respect of the specifically devised realty must be paid out of the general residuary estate in exoneration of the specifically devised realty.

In that case the settlement was created by the will and the direction was to pay "my debts funeral and testamentary expenses and duties" out of residue. Farwell J. said (2): "The expression 'my duties' is certainly a wide phrase, and I can see no ground for restricting its generality. I think it is a compendious way of expressing what he had in his mind, and that he meant to say, 'all duties to which my estate is liable by reason of any of the dispositions I have made in my will.'"

On the construction of the will in the present case I think the testator was merely directing that all death duties in fact payable by the trustees of his will were to be borne by residue and that he did not intend to include duties really payable by persons claiming under another instrument and recoverable from them by the will trustees, but merely meant net duties to which his estate was liable without any statutory right of recovery from other persons. I therefore hold that the rateable part of the estate duty on the Towthorpe estate apportionable in respect of the 15,000*l.* charge is payable by the settlement trustee.

The same reasons apply a fortiori to the incidence of the settlement estate duty and succession duty on the 15,000*l.* These duties are not primarily payable out of the testator's estate at all, but by the trustee of the settlement made prior to the will, and the only liability (if any) of the will trustees would be

(1) [1904] 2 Ch. 345. (2) [1904] 2 Ch. 347.

to see that the settlement trustee paid the duties. The settlement estate duty, succession duty, and the rateable part of the estate duty must therefore be borne by the settled fund.

Solicitors: *Bell, Brodrick & Gray, for Parker & Parker, Selby.*

G. R. A.

In re BRITISH RED CROSS BALKAN FUND. BRITISH RED CROSS SOCIETY *v.* JOHNSON.

[1914 B. 1716.]

Trust—Resulting Trust—Fund raised by Subscription for Special Object—Unapplied Surplus—Resulting Trust for Subscribers—Rule in Clayton's Case.

A fund was raised by subscription for the assistance of the sick and wounded in the Balkan war.

Subscriptions came in from time to time and the fund was duly applied by the trustees from time to time during the war.

At the close of the war there was an unexpended balance in the trustees' hands which admittedly belonged to some or all of the subscribers by way of resulting trust:—

Held, that the rule in *Clayton's Case* (1816) 1 Mer. 572, 608, was inapplicable, and that the balance belonged to all the subscribers rateably in proportion to their subscriptions, irrespective of date.

ORIGINATING SUMMONS.

In October, 1912, the plaintiffs issued an appeal to the public for subscriptions to a special fund for assisting the sick and wounded in the Balkan war.

Large sums amounting to 28,682*l.* were subscribed from time to time and the fund was duly applied by the plaintiffs from time to time during the war. At the end of the war there was an unexpended balance of 12,655*l.* 19*s.* 6*d.* in the plaintiffs' hands, which admittedly belonged to some or all of the subscribers by way of resulting trust.

In July, 1913, the plaintiffs circularized the subscribers asking whether the unexpended balance might be devoted to the general purposes of the society. In the result 2310 subscribers of 23,279*l.* consented, 21 subscribers of 295*l.* dissented, and 923 subscribers of 5108*l.* sent no reply. Some of the

ASTBURY J. dissenting subscribers wished their money returned, others that it should be given to some other fund.

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The question arose whether the rule in *Clayton's Case* (1) was applicable. If so the accounts shewed that the balance in hand must be treated as derived from subscriptions coming in on or after November 8, 1912, and would belong to the subscribers who had subscribed on or after that date, so that they could get their subscriptions back in full if they so desired. On the other hand, if the rule was not applicable, the expenditure would be treated as made rateably out of all the subscriptions irrespective of their date, and the unexpended balance would belong to all the subscribers rateably in proportion to their subscriptions.

On May 22, 1914, the plaintiffs issued this summons to determine this and other points.

Howard Wright, for the plaintiffs. There is no direct authority on the point, but prima facie the presumption is that the subscribers gave their subscriptions to the entire fund en bloc, which case the unexpended balance would belong to them in rateably as in *In re Abbott Fund Trusts.* (2)

Roger Turnbull, for subscribers who had subscribed before November 8, 1912, adopted this argument.

H. O. Danckwerts, for subscribers who had subscribed on or after November 8, 1912. The rule in *Clayton's Case* (1) is applicable.

[ASTBURY J. That rule applies to an account current kept as a banking account between two parties: *The Mecca.* (3) Has it ever been applied to a number of subscribers to a fund?]

There is no reported case on the point. But there is no reason why the rule should not be applied. The subscriptions were paid to the plaintiffs. The plaintiffs paid them into their bank and presumably paid them in as and when received. They had obviously no intention of making any appropriation, so that as between them and the bank the rule in *Clayton's Case* (1) is applicable. That being so it is applicable in favour of third parties—*Deeley* v. *Lloyds Bank* (4)—and the later subscribers are entitled to claim the benefit of the rule.

(1) 1 Mer. 572, 608.
(2) [1900] 2 Ch. 326.
(3) [1897] A. C. 286, 290.
(4) [1912] A. C. 756.

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ASTBURY J. The rule in *Clayton's Case* (1) as restated by Lord Halsbury L.C. in *The Mecca* (2) is that "where an account current is kept between parties as a banking account, 'there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side; the appropriation is made by the very act of setting the two items against each other.'"

It is a mere rule of evidence and not an invariable rule of law, and the circumstances of any particular case may or may not afford ground for inferring that the transactions of the parties were not intended to come under the general rule.

In the present case the rule is obviously inapplicable. At the outbreak of the Balkan war a public appeal was made for subscriptions for a special fund for assisting the sick and wounded. Subscriptions were obtained and duly applied, and at the close of the war there was an unexpended balance of 12,655*l.* 19*s.* 6*d.* That balance belongs to all the subscribers rateably in proportion to their subscriptions, and subscribers who wish their money returned and are unwilling to leave it for the general purposes of the society are entitled to such proportion of their subscriptions as the total amount unexpended bears to the total amount subscribed.

Solicitors: *Freshfields.*

(1) 1 Mer. 572, 608.

(2) [1897] A. C. 286, 290.

G. R. A.

JOYCE J.
1914
May 27, 28;
July 16.

In re AYNSLEY.
KYRLE *v.* TURNER.

[1914 A. 123.]

Will—Legacy—Ademption—Particular Purpose—Bequest for Purchase of Land for Benefit of Parish Church—Subsequent Purchase and Gift of Land for like Purpose—Both Gifts in Memory of Testator's Wife—Codicil confirming Will.

By his will dated December 31, 1904, the testator bequeathed 500*l.* to his trustees on trust to purchase land in Madley to be used as glebe for the vicarage of the parish church of Madley, and declared that he made the bequest in pursuance of the express wish of his wife to do something for the parish.

After his wife's death in 1896, the testator had told the vicar that he should like to do something in memory of his wife and that what she would have liked best would be the gift of a meadow, called St. Mary's Meadow, to the living. In 1905, the testator hearing from the vicar that the meadow was for sale, purchased it for 375*l.*, and in November, 1905, conveyed it by deed to the defendant corporation in trust for the augmentation of the endowment of the incumbent for the time being of the living of the parish of Madley. The deed recited that the testator had purchased the land with the object and intention of presenting the same to the living of Madley in memory of his wife.

By a codicil dated November 17, 1911, the testator bequeathed certain legacies not affecting the above-mentioned bequest and in all other respects confirmed his said will:—

Held, that there was no inconsistency between the bequest in the will and the gift inter vivos, which latter was the gift of a particular piece of land which was discussed before the will was made and might have been an act of spontaneous bounty quite independent of the legacy or of any moral obligation created by the wife's request to do something for the parish; that the confirmation of the will by the codicil was an important fact which could not be left out of consideration; and that there had been no ademption, either complete or partial, of the legacy.

Adjourned Summons.

By his will dated December 31, 1904, the testator, the Reverend John Cruger Murray Aynsley, appointed the plaintiffs his executors and trustees and (inter alia) bequeathed the sum of 500*l.* to his trustees "Upon trust that the trustees or trustee shall invest the same in such manner both as to the land to be purchased and as to the time of the purchase as shall appear to

them him or her in their his or her absolute and uncontrolled discretion to be to the best advantage in the purchase of land in the parish of Madley in the county of Hereford such land to be used as glebe land for the vicarage of the parish church of Madley aforesaid and to be conveyed and assured to the person or persons or body or bodies politic or corporate entitled to receive take and hold the same for the purpose aforesaid"; and the testator, after directing that until the purchase was made the said sum should be invested as therein mentioned and the income paid to the vicar for the time being of the said parish church of Madley, continued: "And I declare that the bequest lastly hereinbefore contained is made by me in pursuance of the express wish of my said wife to do something for the said parish."

It appeared from the evidence that a few days after the funeral of his wife in 1896 the testator told the vicar of the parish church of Madley, the defendant the Reverend G. W. Turner, that he (the testator) should like to do something in memory of his wife, and subsequently mentioned that he thought what his wife would have liked best of all would be the gift of a piece of land in Madley known as St. Mary's Meadow. In 1905 the vicar, hearing that the meadow was for sale, informed the testator, with the result that the meadow was ultimately purchased, and by a deed of conveyance dated August 2, 1905, St. Mary's Meadow was conveyed to the testator in fee simple in consideration of the sum of 423*l.* paid by him, such sum being 375*l.* the amount at which he purchased the land at a sale by auction and 48*l.* the amount payable for the timber, which latter sum was in fact found by the vicar of the parish to whom it was agreed the timber should belong. The testator never told the vicar anything about the bequest in his will.

By a deed of conveyance dated November 25, 1905, and made between the testator of the first part, the defendant vicar of the second part, and the Hereford Diocesan Finance Association of the third part, after reciting the last-mentioned conveyance and that the said J. C. M. Aynsley in fact purchased the hereditaments with the object and intention of presenting the same to the living of Madley in memory of his wife, Harriett Georgina Maria Murray Aynsley, who was buried in the churchyard of

JOYCE J. 1914 AYNSLEY, *In re.* KYRLE *v.* TURNER.

the said parish, the said J. C. M. Aynsley conveyed St. Mary's Meadow to the association, their successors and assigns, upon trust for the use, benefit, and enjoyment of the defendant vicar so long as he continues to hold the living of the said parish of Madley as if it were part of the glebe of the said living and subject thereto upon trust for the augmentation of the endowment of the incumbent for the time being of the living of the said parish of Madley with such and the same beneficial interest therein and subject to such obligations as if the same were a part of the glebe of the said living. Then followed a proviso that if the Church of England should cease to be constituted as at present or if from any cause there should cease to be an incumbent of the living the said hereditaments should be held upon like trusts for the endowment of the spiritual person who in the opinion of the association most nearly corresponded with the incumbent of the said living. The conveyance was duly enrolled in the Central Office of the Supreme Court on December 7, 1905.

After the execution of the conveyance of November 25, 1905, there was placed in Madley parish church, with the knowledge and approval of the testator but at the expense of the vicar, a tablet recording the fact of the presentation of St. Mary's Meadow by the testator in memory of his wife.

By a codicil dated November 17, 1911, to his will the testator bequeathed certain further legacies to private persons and in all other respects confirmed his said will. The testator died in January, 1913.

The plaintiffs took out this summons, to which the vicar of the parish, the Hereford Diocesan Finance Association, and the residuary legatees were defendants, for the determination of the question whether the legacy of 500*l.* bequeathed by the testator's will as above mentioned was adeemed wholly or partly by the conveyance of November 25, 1905, by the testator to the defendant association.

A. H. Droop (*Dighton Pollock* with him), for the plaintiffs, stated the facts.

H. E. Wright, for the defendant vicar and association. There

has been no ademption in this case. "In order to adeem a gift by will, the property afterwards given must be of the same kind as that given by will": Theobald on Wills, 7th ed. p. 769. In this case the gift in the will was of money and, in the deed, of land, and the two gifts are in a sense incommensurable. To effect ademption the two gifts must be ejusdem generis: *Holmes* v. *Holmes* (1); *In re Jaques* (2); White and Tudor's Leading Cases, 8th ed. vol. ii. p. 392 notes on *Ex parte Pye* (3) and the cases there cited. In both *In re Pollock* (4) and *In re Corbett* (5) the gifts were of the same subject-matter.

There is a great difference between the terms of the will and the conveyance, and there is no inconsistency between the two purposes. The purposes must exactly correspond for ademption to be effected: Roper on Legacies, 4th ed. p. 381.

Moreover, there has been confirmation by the codicil in this case subsequent to the conveyance of the land, and, as pointed out by Stirling L.J. in *In re Scott* (6), that is a circumstance which cannot be left out of account.

Whitmore Richards, for the defendant residuary legatees. Ademption took place in 1905 when St. Mary's Meadow was bought and conveyed to the association, and the conveyance identifies the land as conveyed for the particular object of the legacy as expressed in the will. If the particular purpose of a legacy has been attained after the legacy has been given, then the legacy is adeemed in its entirety: *In re Pollock* (4); *In re Corbett*. (5)

When ademption has already taken place the subsequent confirmation of the will by a codicil does not revive the legacy: *Powys* v. *Mansfield*. (7)

Cur. adv. vult.

July 16. JOYCE J. The testator in this case, who died in January, 1913, by his will dated December 31, 1904, amongst other legacies bequeathed 500*l.* to trustees upon trust to invest the same in the purchase of land to be used as glebe land for the

(1) (1783) 1 Bro. C. C. 555.
(2) [1903] 1 Ch. 267.
(3) (1811) 18 Ves. 140, 151.
(4) (1885) 28 Ch. D. 552.
(5) [1903] 2 Ch. 326.
(6) [1903] 1 Ch. 1, 14.
(7) (1837) 3 My. & Cr. 359, 376.

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vicarage of the parish church of Madley, and to be conveyed to the person or body entitled to receive, take, and hold the same for the purposes aforesaid. Then there is a direction as to interim investment before the purchase of the land, and later on he declares that the bequest lastly hereinbefore contained—that is the bequest in question—was made by him in pursuance of the express wish of his wife to do something for the parish.

His wife died in August, 1896, and it appears from the affidavit of the vicar that very shortly after her death the testator told the vicar that he would like to do something in memory of his wife, and then there was a discussion about it. A few days later the testator told the vicar that he thought what his wife would have liked best of all would be a gift of St. Mary's Meadow. I gather that piece of land was convenient or possibly important to be held in connection with the vicarage or something that belonged to the advowson. From time to time there was correspondence between the testator and the owner, but no purchase was then made. That was in 1896, and then in 1904 the testator made his will containing the bequest now in question. Then later on, in 1905, the vicar heard that the meadow was for sale and that there was a possible purchaser, and there was some negotiation. Ultimately the testator did purchase this meadow. It was rather a peculiar arrangement, because he did not pay the whole of the purchase-money, the vicar paying part. The testator paid 375*l.* and the vicar paid 48*l.*, and by the conveyance, which I need not go through in detail, the land was conveyed to a corporate body created for the purpose of holding property in trust for churches and ecclesiastical purposes in the diocese, with a clause at the end which I do not think is very material. [His Lordship read the proviso relating to the constitution of the Church of England, and continued :]

After that the vicar—not the testator—appears to have placed a tablet in the church stating that this meadow had been given to the living in memory of the testator's wife.

The question is now raised by the persons who take the residue, which I am told is very considerable in amount, whether the legacy of 500*l.* for the purpose I have mentioned in the will was satisfied or adeemed by the specific gift by the

testator of the land, that is of St. Mary's Meadow. It is not a case between relatives but between strangers; and there is no doubt that where legacies are given, or a legacy is given, to a mere stranger the doctrine of ademption or satisfaction has never been applied except under peculiar circumstances, as for instance where the legacy is given for a particular purpose and a donation or gift is afterwards made by the testator by an act inter vivos exactly for the same purpose and none other. But in the case of a stranger the onus probandi is distinctly upon those who contend that the two provisions are to be construed as one, whereas with regard to children where it is a question of double portions the onus is on those who contend for the double portion. That is the way the law is usually stated in the various text-books, though I confess it is not absolutely clear what is the meaning in certain cases of the words "given for the same purpose."

The case before Earl Selborne of *In re Pollock* (1) was a case where a testatrix bequeathed 500*l.* "according to the wish of my late beloved husband," and she afterwards paid 300*l.* to the legatee with a contemporaneous entry that such payment was a legacy from the husband, and it was held there, and there was no doubt about it in that particular case, that the 300*l.* was really paid in respect of the legacy. Earl Selborne said (2): "The presumptions arising out of the parental relation do not of course extend to any case in which the legatee is a stranger to that relation. But numerous authorities have determined that if a legacy appears on the face of the will to be bequeathed (though to a stranger) for a particular purpose, and a subsequent gift appears by proper evidence to have been made for the same purpose, a similar presumption is raised prima facie in favour of ademption. And it is clear from the authorities, that evidence of the circumstances under which the subsequent gift was made including contemporaneous or substantially contemporaneous declarations of the donor (whether communicated to the donee or not) may be admissible in such a case. To constitute a particular purpose within the meaning of that doctrine it is not,

(1) 28 Ch. D. 552. (2) 28 Ch. D. 556.

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in my opinion, necessary that some special use or application of the money, by or on behalf of the legatee (e.g., for binding him an apprentice, purchasing for him a house, advancing him upon marriage, or the like), should be in the testator's view. It is not less a purpose, as distinguished from a mere motive of spontaneous bounty, if the bequest is expressed to be made in fulfilment of some moral obligation recognised by the testator, and originating in a definite external cause, though not of a kind which (unless expressed) the law would have recognised, or would have presumed to exist. And it appears to me that a case of this kind comes very near, in principle, to the first class of cases, in which ademption by a subsequent gift is inferred from the parental relation. The reasonable presumption is the same, namely, that as the purpose of both gifts was to fulfil one and the same antecedent obligation or duty, a double fulfilment was (presumably) not intended." Whatever difficulty is created or may be created by the introduction of the consideration of moral obligations other than those arising from the parental relation, this case finally established that where the amount of the subsequent gift was less than the legacy the ademption if any is only pro tanto.

In the present case there was a legacy of 500*l.* directed to be invested in land to be added to the glebe, and afterwards there is a gift of a piece of land, not quite a simple gift to the living, although it is for the benefit of the parish and practically the same. It cost the testator 375*l.*, but nevertheless it does not necessarily follow that it was the value, and I doubt whether there could, in the circumstances, be an ademption of the legacy at all. It is a gift of a particular piece of land which was discussed before the will was made, and it may have been an act of spontaneous bounty quite independent of the legacy or of any moral obligation created by the wife's request to do something for the parish. There is no inconsistency between the two gifts.

It appears, however, this conveyance being in 1905, that in November, 1911, the testator made a codicil whereby he gave and bequeathed other legacies, and in all other respects he confirmed his will. Now the effect of such a codicil, as stated by

Stirling L.J. in the case of *In re Fraser* (1), is to bring the will down to the date of the codicil and effect the same disposition of the estate as if the testator had at that date made a new will containing the same dispositions as the original will but with the alterations introduced by the various codicils. No doubt where a legacy has been adeemed or satisfied the confirmation in terms of the will by subsequent codicils may or may not be merely formal, but confirmation of the will by a subsequent codicil will not set up the legacy again when it has been adeemed or satisfied, but where there is a serious doubt as to whether there has been ademption or not, the fact of there being a subsequent codicil confirming the will in all respects is to my mind very important. Stirling L.J. in *In re Scott* (2) says this: "In *Ravenscroft* v. *Jones* (3) it was laid down by Knight Bruce L.J. that 'the existence of such a codicil, even though not decisive of the question, is a fact which cannot be left out of consideration'; and, looking at all the circumstances of the present case, I think that the learned judge has come to a right conclusion as regards the sum of 5000*l.*," and so on. That was a question of ademption or satisfaction. He was referring to what Knight Bruce L.J. said in *Ravenscroft* v. *Jones*. (3) Then, as is remarked in a very old case, where the codicil was certainly considered to be of importance, of *Roome* v. *Roome* (4), "It appears too manifestly by one circumstance, the testator did not intend himself there should be any ademption of the thousand pounds, and that is the codicil (made above a year after the hundred and twenty-six pounds had been laid out for apprenticing the defendant), which is a confirmation of the legacy, and amounts to a republication of the will. If the testator had any intention of deducting the hundred and twenty-six pounds out of the thousand pounds, he had a fair opportunity of doing it when he was adding a codicil," and so on.

I cannot assent to the view that words such as those in the codicil should be treated as having no meaning. I think the codicil must be taken to mean what it says. If the testator

(1) [1904] 1 Ch. 726, 734.
(2) [1903] 1 Ch. 1, 14.
(3) (1864) 4 D. J. & S. 224, 228.
(4) (1744) 3 Atk. 181, 183.

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himself made the codicil I must assume, and it must be taken, that when he confirmed the will in other respects he had this disposition of the legacy of 500*l.* in mind, and if the codicil was made by a draftsman all I can say is that no professional draftsman does, or ought to, frame a codicil without having the will before him. Upon the whole I come to the conclusion in this case that there has been no ademption.

Solicitors: *Crowders, Vizard, Oldham & Co., for Humfrys & Symonds, Hereford; Cree & Turner, for E. Stanley Lloyd, Ludlow.*

R. M.

EVE J.
1914
April 3, 7, 21; *May* 27; *July* 10.

[LIVERPOOL DISTRICT REGISTRY.]

In re BLACKBURN PHILANTHROPIC ASSURANCE COMPANY, LIMITED.

[1914 B. 410.]

Friendly Society — Conversion into Limited Company — Memorandum of Association — Enlargement of Objects — Special Resolution — Validity — "Members" of the Company — Friendly Societies Act, 1896 (59 & 60 *Vict. c.* 25), *s.* 71—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 9, 24.

A burial society which subsequently conducted life assurance business up to a limited amount was registered under the Friendly Societies Act, 1896, and attained to a membership of 373,000, with an income of 149,000*l.* a year. In 1913 a special resolution was passed for the conversion of the society into a company limited by shares pursuant to s. 71 of the Friendly Societies Act, 1896. The objects of the company under its memorandum were restricted to the objects of the society immediately prior to the conversion. There were no signatories to the memorandum of association, and no register of shareholders of the company; nor had any shares been in fact allotted. It was estimated that two years might elapse before the allotment of shares could be made. In 1914 a special resolution of the company was passed altering and extending the object clauses of the memorandum. Upon a petition being presented by the company for the confirmation by the Court of this special resolution:—

Held, that the conversion of the society into a limited company under s. 71 of the Friendly Societies Act, 1896, did not involve the simultaneous conversion of the members of the society into members of the company, and inasmuch as there were no members of the company in

existence within the definition of s. 24 of the Companies (Consolidation) Act, 1908, there was no special resolution properly passed which the Court could confirm, and no such order as was asked could be made on the petition.

THIS was a petition by the Blackburn Philanthropic Assurance Company, Limited, for the confirmation by the Court of the alteration of the memorandum of association as to objects.

The petition was not served upon any one, but in the course of the argument, at the suggestion of the judge, one of the opposing members of the society was made a respondent to the petition, so that the case of the opposition might be put fully before the Court. The facts are taken from the judgment of the Court, and are as follows :—

The Blackburn Philanthropic Friendly Collecting Society was established in the year 1839 under the name of the Blackburn Philanthropic Burial Society, with the object of providing funds "for the decent interment of members." In 1863, when its members numbered 80,000, it first commenced to transact life assurance business, the sums payable at death varying from 8*l.* to 100*l.* In 1888 the limit of assurance was increased to 200*l.*, and in 1912 to 300*l.* Between these two dates the society had changed its name by the substitution of the words "Friendly Collecting" for the word "Burial" in its original title and had, on the coming into operation of the Friendly Societies Act, 1896, and the Collecting Societies and Industrial Assurance Companies Act, 1896, become subject to the provisions of both Acts.

At the date of a special resolution for converting the society into a company limited by shares the society's business was carried on in the counties of Lancaster, York, Chester, and Leicester exclusively and had attained large dimensions; the members numbered over 373,000, and the average amount of funds per member was within a fraction of 35*s.* The total income from premiums and other sources during 1912 was, in round figures, 149,000*l.*, and the accumulated funds at the end of that year amounted to 652,500*l.*, or thereabouts.

The board of management, having come to the conclusion that the financial position of the society, its organization, and its sphere of operations all combined to make an extension of its

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objects and an increase of its powers desirable, were advised that the proper procedure whereby to attain these ends was to convert the society under s. 71 of the Friendly Societies Act, 1896, into a company limited by shares, and then to alter the provisions of the memorandum of association with respect to the objects of the company under s. 9 of the Companies (Consolidation) Act, 1908.

Accordingly on August 6 and 27, 1913, a special resolution was passed for the conversion of the society into a company limited by shares, and on September 2, 1913, the company was registered as the Blackburn Philanthropic Assurance Company, Limited, with a capital of 1,000,000*l.* in 1*l.* shares. The objects of the company as enumerated in clause 3 of its memorandum were restricted to the objects of the society immediately prior to the conversion, and the memorandum, in accordance with the practice obtaining in such cases, was registered without the names of any subscribers being appended thereto.

Articles 4 to 7 of the articles of association registered with the memorandum provided for the manner in which the original share capital was proposed to be dealt with, and were as follows: Article 4. "None of the original shares shall be offered to the public for subscription. (5.) The shares of the company shall be issued and allotted as fully paid to all persons who were members of the Blackburn Philanthropic Friendly Collecting Society at the date of the certificate of incorporation of the company in the following manner, that is to say, each such person shall be allotted upon application shares, a share and (or) a fraction of a share which in nominal value shall bear the same proportion to the total amount of shares (namely, 1,000,000*l.*) as the total contributions paid by such person to the said society in respect of existing assurances at the date of the said certificate bear to the total contributions paid by all such persons to the said society in respect of assurances in force at the date of the said certificate. (6.) Every application for shares of the company shall be made and the allotment thereof shall be accepted upon the condition that the person making the application and accepting the allotment releases and discharges the Blackburn Philanthropic Friendly Collecting Society and the trustees and

the property thereof and the company from all rights and claims subsisting against and from all penalties (if any) incurred by the Blackburn Philanthropic Friendly Collecting Society which such person has or may be entitled to enforce. (7.) If any member of the Blackburn Philanthropic Friendly Collecting Society who is entitled to shares, or a share and (or) a fraction of a share under the preceding clauses hereof should refuse or fail or neglect to apply therefor a proportionate part of the share capital of the company shall be retained, and a proportionate part of the property of the Blackburn Philanthropic Friendly Collecting Society shall be set apart and appropriated and accumulated to meet all rights and claims subsisting against and all penalties (if any) incurred by the Blackburn Philanthropic Friendly Collecting Society which such member has or may be entitled to enforce." Article 8 set out the form in which an application for shares was to be made.

These application forms were distributed amongst the members and some of them had already been returned, but of these many were only partially or incorrectly filled up and all would require to be verified with the entries in the books. This operation would take a considerable time to complete, and it was estimated that another two years might elapse before the allotment of shares could be made.

P. O. Lawrence, K.C., and *J. L. Collinson*, for the petition. The company is in a flourishing condition and by the quinquennial valuation of 1909 shewed a surplus of 130,000*l.* Having regard to the decision in *Blythe* v. *Birtley* (1) the course has been adopted of converting the society into a company with identical objects, and then applying the machinery of the Companies (Consolidation) Act, 1908, to enlarge the objects of the memorandum.

A special resolution for that purpose has been passed in accordance with s. 9 of that Act, and all the requirements of that section have been complied with. It is proposed to extend the amount for insurances, and to enable the company to carry on other businesses. The question is whether the Court will

(1) [1910] 1 Ch. 228.

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sanction the proposed extension. In the case of *McGlade* v. *Royal London Mutual Insurance Society* (1), a similar conversion of a society into a company had taken place, but the plaintiff there was in a position which debarred him from bringing his action.

The present case is the first instance of a clear conversion of a society into a company with identical objects, and then a subsequent application for an enlargement of the objects. But it is submitted that there is no legal objection to such a proceeding. Every member of the society becomes a shareholder and contributory of the company upon the conversion of the society. The case of *In re Foreign and Colonial Government Trust Co.* (2) is somewhat analogous. In that case wider powers of investment were granted to a company than those originally contained in the memorandum of association, and the case of *In re Governments Stock Investment Co.* (3) was referred to and distinguished.

Maugham, K.C., and *Dighton Pollock*, for James Frankland, the opposing respondent to the petition. These resolutions have never been duly passed. There are no members of the company in existence. No shares have ever been allotted, and it is admitted that it will take some two years to examine the books and calculate out the share capital of all the former members of the society. There are also no signatories to the memorandum of association. The friendly society has ceased to exist, but its members have not become shareholders of the company into which the society has been converted. The members have the same rights or claims as they had against the society and can enforce their claims in the same manner as if it had not become a company. That appears from the concluding part of s. 71 of the Friendly Societies Act, 1896. There being no members of the company, the meeting was wholly void and illegal. Sect. 24 of the Companies (Consolidation) Act, 1908, defines a member of a company to be (1.) a subscriber of the memorandum of association, or (2.) a person who has agreed to become a member, and whose name is entered on the register of members. In the

(1) [1910] 2 Ch. 169. (2) [1891] 2 Ch. 395.
(3) [1891] 1 Ch. 649.

present case there is no register of members in existence. The meeting was also summoned by advertisement in the papers and not by notice given to each alleged member, and the articles of association have not been complied with in other particulars. It appears from the evidence that some 200 persons only voted at the first meeting when the resolution was passed and a smaller number at the second confirmatory meeting. That was a very small percentage of the total number of members to effect a profound alteration in the position of the company. It is not right to do in two steps what *Blythe* v. *Birtley* (1) decided could not be done in one.

P. O. Lawrence, K.C., in reply. Every member of the society becomes automatically a member of the company directly the resolution to register it becomes effective. There can be shareholders of a company even when there is no register of shareholders: *Portal* v. *Emmens.* (2) Here the great bulk of the society wish for the change and the Court in its discretion may sanction the resolution.

Cur. adv. vult.

July 10. EVE J., after stating the facts as above set out, continued: The present petition is presented by the company and it seeks the confirmation by the Court of a special resolution altering and extending the objects clause of the memorandum alleged to have been passed and confirmed at extraordinary general meetings of the company held on February 17 and March 5 last.

The presentation of the petition was followed by so many letters being addressed to me by members of the society apparently desirous of opposing the making of any order, that I thought it better that they should have an opportunity of stating their grounds of opposition, and with the cordial assent of counsel for the petitioners one of the opposing members was made a respondent to the petition, on the terms that his costs should in any event be paid by the company.

Counsel on his behalf has submitted several points of objection to the proposed modifications of the company's constitution, one

(1) [1910] 1 Ch. 228. (2) (1876) 1 C. P. D. 201.

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of which goes to the root of the whole matter in that it raises the contention that there is no valid resolution of the company which the Court can confirm.

This contention is based on the allegation that there have never been and down to the present time there are not any members of the company—an allegation which is met with the submission that all the members of the society became members of the company at the instant when their corporate existence as the one statutory body ceased and their existence as the other statutory body commenced.

Which of these two contentions is right? There is nothing, in my opinion, in s. 71 of the Friendly Societies Act, 1896, to support the view that the conversion of the society into a company limited by shares involves the simultaneous conversion of members of the society into members of the company. Apart from the practical difficulty amounting in the present case to the impossibility of determining within any reasonable time after the conversion the pecuniary interest of each member in the company's share capital, and of complying with the statutory requirements as to opening and posting up the register of members and making the statutory returns, such an interpretation would introduce a remarkable modification into the law of joint stock companies. By s. 24 of the Companies (Consolidation) Act, 1908, the two classes of persons who are to be deemed members of any company under that Act are (1.) the subscribers to the memorandum, and (2.) every other person who has agreed to become a member of the company; but if the registration of a society as a company operates to convert the members of the society into members of the company, there is a third class of persons who are to be deemed members of "a company under the Act," that is to say, persons who have not signed the memorandum of association and who have never agreed to become members of the company, persons, indeed, who may have actively opposed the conversion, and who would never voluntarily agree to become members of the company. I cannot bring myself to believe that a conversion under s. 71 was ever intended to have such consequences, and I hold that no such results follow therefrom.

It is said that this conclusion leaves the members in a very unenviable position, as the society of which they were formerly members no longer exists, and they have no interests in the company which has superseded it. I do not agree, for I think that under the concluding part of s. 71 the members retain the same rights against the assets of the society in the hands of the company as they would have had against them had the society continued to exist as a registered friendly society. The release embodied in the form of application for shares adopted in the present case shews that this view is shared by the company's advisers.

The point, therefore, which has been raised falls to be decided under the Companies Act and not under the Friendly Societies Act, and there being no persons who have subscribed the company's memorandum of association, the matter is resolved into the inquiry whether there are any persons who have agreed to become members of the company. An agreement to become a member of or, in other words, to take shares in a company may be come to in many different ways; in this, as in most cases, it is contemplated that the contract will be founded on an application for shares by the intending member. In a contract so founded there are two other essentials beyond the application for shares, that is to say, an allotment and a communication to the allottee of the fact that the allotment has been made. In the absence of any one of these essentials there is no contract. Here, although there have been applications made for shares, neither of the other essentials is present in a single case, and in my opinion it is impossible on these facts to hold that any person has as yet agreed to become a member of the company. Some have undoubtedly offered to do so, but their offers have not ripened into contracts and can still be withdrawn. In my opinion no effective resolution was passed or capable of being passed at the meetings of February 17 and March 5, to both of which were summoned not only the members of the company, but all persons entitled to attend and vote thereat—that is to say, every person who had been a member of the society for the full period of six calendar months immediately preceding the incorporation of the company.

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On the short ground, therefore, that there is no resolution which the Court can confirm, I can make no order on the petition except that the company do pay the taxed costs of the respondent.

Solicitors: *Arthur S. Mather & Son, Liverpool, for Yates & Son, Blackburn; W. J. & E. H. Tremellen, for Thomas Marsden, Blackburn.*

G. M.

ASTBURY J.
1914
July 14, 15.

In re H. E. THORNE & SON, LIMITED.

[00103 of 1912.]

Bankruptcy—Mutual Dealings—Set-off—Insolvent Company—Winding-up—Secured Creditor—Mortgage of Chattels—Insurance in Creditor's Name—Receipt of Insurance Money before Winding-up—Surplus over Secured Debt—Set-off against Unsecured Debt—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 38—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 207.

Company A. had considerable mutual business dealings with company B. in the course of which dealings it borrowed money from company B. on two bills of sale charging certain machinery and providing for its insurance against fire.

The machinery was insured in the name of company B., the premiums being charged to company A.

The machinery was destroyed by fire, and company B. received 1600*l.* insurance money.

About a fortnight later company A. was wound up voluntarily and was found to be insolvent.

At the date of the winding-up 744*l.* remained due on the bills of sale, so that company B. had a surplus of 856*l.* insurance money in hand for company A. after deducting the secured debt.

On the other hand company A. owed company B. 2099*l.* unsecured book debts:—

Held, that as the mutual dealings had resulted in cross money claims "before" the winding-up company B. was entitled to set off the 856*l.* surplus insurance money against the 2099*l.* book debts under the Bankruptcy Act, 1883, s. 38 (the "mutual dealings" section), which applies to insolvent companies under the Companies (Consolidation) Act, 1908, s. 207.

Principles stated in *Eberle's Hotels Co.* v. *Jonas* (1887) 18 Q. B. D. 459, 465, applied.

Talbot v. *Frere* (1878) 9 Ch. D. 568 and *In re Gregson* (1887) 36 Ch. D. 223 (cases under the old statutes of set-off), and *In re Gedney*

[1908] 1 Ch. 804 (a case under s. 38), in which cases the claim to a set-off failed for want of mutuality, and *In re Pollitt* [1893] 1 Q. B. 455, *In re Mid-Kent Fruit Factory* [1896] 1 Ch. 567, and *Ex parte Caldicott* (1884) 25 Ch. D. 716, in which cases s. 38 was impliedly excluded by the special contract therein, distinguished.

ORIGINATING SUMMONS.

The above company was incorporated on April 4, 1901, to carry on business in Barbados. It had considerable business dealings with the respondents, the British Cotton Growing Association of Manchester, in the course of which dealings it obtained certain advances on two bills of sale.

By a bill of sale dated February 1, 1906, the company conveyed certain hydraulic presses and other machinery in Barbados to the respondents by way of mortgage for securing the repayment of the sum of 1115*l.* advanced by the respondents. The company covenanted to repay the money, and to insure the machinery in the sum of 1000*l.* at least, and it was agreed that, if the company made default in insuring, the respondents might insure, and that the premiums should be repayable to them on demand and until repayment should be a charge on the machinery. It was provided that the machinery should not be liable to seizure or to be taken possession of by the respondents for any cause other than those specified in s. 7 of the (Barbados) Bills of Sale Act, 1893, which corresponds to s. 7 of the (English) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Viet. c. 43). There was no express power of sale.

By another bill of sale dated January 11, 1909, the company conveyed other machinery in Barbados to the respondents by way of mortgage for securing the repayment of 624*l.* This contained similar provisions as to insurance up to 600*l.* at least.

The English rates were lower than the Barbados rates, and at the company's request the respondents insured the machinery in their own names for 1600*l.* in an English insurance company, charging the premiums to the company's account.

On July 22, 1910, the company's premises in Barbados were burnt down and the machinery injured or destroyed.

On August 9, 1910, the managing director in Barbados wrote in the name of the company to the respondents saying that the

ASTBURY J. 1914 H. E. THORNE & SON, LIMITED, *In re.*

company had arranged with the insurance company's agents to take over all the injured machinery on the respondents' behalf at 150*l.*

On August 26, 1910, the managing director, who had then come to England, wrote to the respondents asking for a memorandum of his company's indebtedness to them "after allowing for the insurance of 1600*l.*"

On September 2, 1910, the respondents sent the managing director a memorandum of the company's total indebtedness including the amounts due on the bills of sale and other liabilities and deducting the 1600*l.* recoverable by insurance, and in a later account sent on September 12, 1910, the 1600*l.* received was deducted from the total liabilities. This was done with the managing director's approval, but he had in fact no power to bind the company.

On September 9, 1910, the respondents received 1450*l.*, the balance of the 1600*l.*, in cash from the insurance company. The injured machinery had since been realized on their behalf.

On September 23, 1910, the company was wound up voluntarily in pursuance of a special resolution passed on September 8 and confirmed on September 23, 1910. The company was found to be insolvent.

The amounts due under the bills of sale had been reduced by repayments, and at the date of the winding-up the amounts of 236*l.* and 508*l.*, making a total of 744*l.*, were due.

At the same date there were also unsecured book debts of 2099*l.* due to the respondents on general account and unsecured debts of 10,348*l.* due to other creditors.

The balance of the 1600*l.* insurance money in the respondents' hands after deducting the 744*l.* due on the bills of sale was 856*l.*

The question was whether the respondents could set off this 856*l.* in their hands against the 2099*l.* which the company owed them on general account, and prove for the balance, 1243*l.*, or whether they must pay the 856*l.* to the liquidator and prove for their whole unsecured debt.

The present dividend was 9*s.* in the pound, so that the amount now in dispute was about 470*l.*, namely, 11*s.* in the pound on

856*l.* The liquidator issued this summons to determine the point.

The respondents relied on the Bankruptcy Act, 1883, s. 38 (1) (the "mutual dealings" section), which is made applicable to insolvent companies by the Companies (Consolidation) Act, 1908, s. 207.

As an alternative point they contended that the 856*l.* had in fact been appropriated to their general account with the knowledge and consent of the company. This point failed on the evidence, and the first point is alone reported.

Cave, K.C., and *Galbraith*, for the liquidator. The fire policy formed part of the respondents' security and subject thereto it belonged to the company: *Salt* v. *Marquess of Northampton.*(2) The 856*l.* the balance on realization of that security was therefore held in trust for the mortgagor company: *Charles* v. *Jones.* (3) There can therefore be no set-off: *Talbot* v. *Frere* (4); *In re Gregson* (5); *In re Pollitt* (6); *In re Mid-Kent Fruit Factory.* (7)

Hon. Frank Russell, K.C., and *Dighton Pollock*, for the respondents. We do not dispute the proposition that where a mortgage is realized "after" the death or bankruptcy of the mortgagor the surplus cannot be set off against a simple contract debt of the mortgagor. In such a case the surplus was never owing to the mortgagor as creditor, so that there were no mutual debits and credits at the date of the death or bankruptcy. In other words there was no mutuality.

Talbot v. *Frere* (4) and *In re Gregson* (5) are instances of this principle. They were decided under the old statutes of set-off

(1) Sect. 38: "Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall be made under this Act, and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; . . . ."

(2) [1892] A. C. 1, 16.

(3) (1887) 35 Ch. D. 544, 549.

(4) 9 Ch. D. 568.

(5) 36 Ch. D. 223.

(6) [1893] 1 Q. B. 455.

(7) [1896] 1 Ch. 567, 570.

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(2 Geo. 2, c. 22, s. 13; 8 Geo. 2, c. 24, ss. 4, 5), but the same principle applies to cases under s. 38: *In re Gedney* (1); *Ex parte Peak Hill Goldfield.* (2) In the latter case Fletcher Moulton L.J. said the true principle was that moneys which under a bankruptcy became payable to the trustee "because they were payable to the debtor" came prima facie within the mutual credits clause, secus, if they were never payable to the debtor.

Now s. 38 is applicable wherever in the result the mutual dealings on each side would end in a money claim: *Eberle's Hotels Co.* v. *Jonas.* (3) In the present case the fire policy formed part of the security for the debt and the cross claims arose on its realization "before" the liquidation. In such a case there may be a set-off: *In re Gregson* (4); *Eberle's Hotels Co.* v. *Jonas.* (5) The mortgagor's claim to the surplus on realization is merely a money claim.

In *In re Pollitt* (6) the money was paid to the solicitor for a specific purpose. He could not therefore set off the unapplied balance against another debt. It would have been a breach of the contract under which the money was held. The same remark applies to *In re Mid-Kent Fruit Factory.* (7) The allowance of a set-off would have been a breach of the specific bailment contract under which the money was received. See also *In re Charlwood.* (8)

Cave, K.C., in reply. In *Eberle's Hotels Co.* v. *Jonas* (3) s. 38 was on the facts inapplicable, and Lord Esher's suggestion that it would apply wherever the dealings on each side would end in a money claim is only a dictum. In the same case Fry L.J. (9) refers to *Ex parte Caldicott* (10) and raises the question whether s. 38 applies to the case of a specific security given for a specific debt.

[ASTBURY J. That suggestion does not seem to have been raised or adopted in *In re Pollitt* (11) or *In re Mid-Kent Fruit*

(1) [1908] 1 Ch. 804.
(2) [1909] 1 K. B. 430, 437.
(3) 18 Q. B. D. 459, 465.
(4) 36 Ch. D. 223, 227.
(5) 18 Q. B. D. 464.
(6) [1893] 1 Q. B. 455, 458.
(7) [1896] 1 Ch. 567, 572.
(8) [1894] 1 Q. B. 643, 646.
(9) 18 Q. B. D. 470.
(10) 25 Ch. D. 716.
(11) [1893] 1 Q. B. 455.

Factory. (1) The section was treated as prima facie applicable, but excluded by the special contract.]

The same principle must apply to the surplus resulting from the realization of a mortgage, which surplus is held in trust for the mortgagor. In *In re Gregson* (2) the claim to set off failed for want of mutuality, and the suggestion that there might have been a set-off if the mortgage had been realized in the testator's lifetime was only a dictum. The same remark applies to the similar suggestion in *Eberle's Hotels Co.* v. *Jonas.* (3)

ASTBURY J. (after stating the facts). There are two questions in this case. The first question is whether apart from any knowledge or consent of the company to the respondents' appropriation of the 856*l.* to their general account the matter falls within s. 38. The second question is whether there was in fact knowledge and consent on the part of the company. The matter has been very fully argued, and I must do my best to deal with the authorities.

On the first point the liquidator contends that the 856*l.* was a surplus arising from the realization of mortgaged property, which surplus he says the respondents held specifically in trust for the company at the commencement of the winding-up, and therefore there was no right of set-off.

In *Talbot* v. *Frere* (4) a debtor having mortgaged certain life policies to a firm of solicitors to secure a bill of costs died insolvent. The solicitors then received the policy moneys, and, after paying themselves their mortgage debt thereout, had a surplus remaining in their hands. The debtor's executrix then filed a bill against the solicitors for accounts and payment of the surplus, and a decree was made directing the usual mortgagor and mortgagee accounts against the solicitors, under which a balance was found due from them as mortgagees. A summons by the solicitors to be allowed to retain the balance in payment of a simple contract debt was refused. Jessel M.R. said (5): "As I understand the matter, if in such a case there is more than sufficient to pay—as there is here—the principal

(1) [1896] 1 Ch. 567.
(2) 36 Ch. D. 223.
(3) 18 Q. B. D. 459, 464.
(4) 9 Ch. D. 568.
(5) 9 Ch. D. 572.

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of the mortgage debt with interest and costs, the mortgagee is a bare trustee of the balance for the executor of the mortgagor, that is, for the mortgagor's estate. But the mortgagees say, 'We are simple contract creditors of the testator. We claim to keep the balance, or—if the balance exceeds the debt—a sufficient part of the balance in payment of our simple contract debt.' That would be perfectly intelligible if the estate were solvent, as it would avoid circuity of action; but the executor says and proves that the estate is heavily insolvent; it is not even sufficient to pay the specialty creditors who, as the law stood at the date of this testator's decease, were entitled to a preference: and the executor says therefore to the mortgagees, 'This is not avoiding circuity of action, but is an attempt on your part as simple contract creditors to gain a preference over creditors of superior degree; but even if there were no creditors of superior degree, and there were—as there are—a great many creditors of equal degree, it is also an attempt to take a preference as regards that degree; therefore I say it is not circuity of action at all, but an attempt on your part to get a preference over the other creditors.'" Then Jessel M.R. proceeded (1): "There is no law, so far as I am aware, which entitles a person who is a bare trustee for the testator or for the testator's estate, to acquire by reason of his position as trustee, any charge or lien on the trust money in respect of a simple contract debt. . . . . What right has the mortgagee to keep the property? None that I know of, because even the right of set-off as at present subsisting is the creation of statute"—i.e., 2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24, ss. 4, 5—"by which, when a man owed money to A., and was also the creditor of A., he was entitled to set-off, but there could not be a set-off until action brought and set-off pleaded. In this case the mortgagee cannot plead set-off. He is a trustee of money for the estate, and his claim is only a simple contract debt against that estate."

That was simply a decision under the old statutes of set-off, and Jessel M.R. merely held, apart altogether from any "mutual dealings" section in the Bankruptcy Act, that on the facts of that case there was no right of set-off.

(1) 9 Ch. D. 573.

In *In re Gregson* (1) a debtor died insolvent, having mortgaged an estate for his own life to secure an annuity granted by himself, payable during his own life. He had also mortgaged a policy on his own life to the same mortgagees. After his death the mortgagees received in respect of the policy a sum more than sufficient to satisfy the amount secured thereon. It was held that they had no right to set off the balance against the executor in respect of arrears of the annuity. In that case as in *Talbot* v. *Frere* (2) the actual decision was that there was no set-off, because the debtor's death having supervened the claim and the debt were not mutual. North J. said (3): "In point of fact there can be no set-off except in cases in which the statute (4) gives a right of set-off. I am not going to read the words of the statute, but the decisions are clear that a debt due by a testator in his lifetime, and for which his executor was never personally liable, cannot be set off against a sum never payable to the testator at all, and in respect of which he never had a right of action, but which first became payable after his death, and then became payable to the use of the executor." At the end of his judgment he said (5): "It is clear to me that the balance in the hands of the respondents is money received to the use of the executor, in respect of which there is no right of set-off." In those cases which were not under s. 38 at all it was held in the circumstances that there was no right of set-off. Earlier in his judgment North J. said (6): "If the power of sale had been exercised in the testator's lifetime, and the office had received a sum more than sufficient to satisfy what was due on the mortgage of the policy, and the testator had claimed the surplus, there might have been a set-off." This passage becomes material when I come to consider the later authorities.

In *In re Gedney* (7) a testator devised and bequeathed his real and personal estate to his widow and appointed her sole executrix. In 1891 the testator died insolvent and his widow did not prove the will. The testator owed money on bonds and

(1) 36 Ch. D. 223.
(2) 9 Ch. D. 568.
(3) 36 Ch. D. 226.
(4) 2 Geo. 2, c. 22, s. 13. See 57 L. J. (Ch.) 221; 57 L. T. 250.
(5) 36 Ch. D. 230.
(6) 36 Ch. D. 227.
(7) [1908] 1 Ch. 804.

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on simple contract, and his real estate was subject to numerous mortgages. Between 1901 and 1904 Harvey purchased the bond and simple contract debts and took transfers of seven mortgages, and before 1906 he realized the mortgages and had a surplus of 1586*l.* thereon. In 1906 administration with the will annexed was granted to Grummitt. In 1907 a creditors' judgment for administration was made. The question was whether Harvey could set off the 1586*l.* in satisfaction of the bond and simple contract debts. Warrington J. held that the case did not fall within s. 38 at all, as at the date of the administration order the bond and simple contract debts were owing by the testator's estate to Harvey, whereas the 1586*l.* was owing by Harvey to the testator's devisee, so that there was no mutuality within the section. In the course of his judgment Warrington J. said (1): "Now does that section allow a set-off to be made in the circumstances of the present case? It is necessary to look again at the actual position. The debts owing to Harvey are debts due from the testator. The money in Harvey's hands is money which never belonged to the testator and was never a debt due to the testator from him. It is money which represents the value of the testator's equity of redemption in certain mortgaged real estate, that is, what remains after payment of the money due upon the mortgage, and the right to receive that money when the power of sale was exercised by Harvey was vested neither in the testator nor even in his creditors, but in the devisee of his estate. It is only by virtue of the Administration of Estates Act, 1833 (3 & 4 Will. 4, c. 104), that creditors of the testator can get that money at all. The money is not a debt due to them . . . . Apart from the provisions of the Bankruptcy Act, 1883, it is quite clear that Harvey can have no right of set-off. That is so decided by *Talbot* v. *Frere* (2) and by *In re Gregson* (3) . . . . The question must therefore depend entirely upon the Bankruptcy Act, 1883, and, under that Act, in order that the right of set-off may be applied it is necessary to find that there have been 'mutual credits, mutual debts, or other mutual dealings between

(1) [1908] 1 Ch. 809. (2) 9 Ch. D. 568.
(3) 36 Ch. D. 223.

the debtor against whom ' the order is made—that is, here, the testator—' and any other person proving or claiming to prove a debt' against his estate. Therefore it is necessary to find a mutual dealing which will give rise to a right of set-off. In the present case there are, as it seems to me, no mutual credits, mutual debts, or other mutual dealings between Harvey and the testator, and for the reason which I have mentioned, namely, that one dealing gives rise to a debt due from the testator to Harvey, and the other gives rise to a debt due from Harvey, not to the testator, but to the testator's devisee."

So far as *Talbot* v. *Frere* (1) and *In re Gregson* (2) are relevant to anything I have to decide here they do not go beyond deciding the point that Warrington J. made so clear in *In re Gedney* (3), namely, that there can be no set-off where mutuality is wanting, apart altogether from any question of s. 38.

The next two cases are much nearer to the present point. In *In re Pollitt* (4) a debtor consulted a solicitor to whom he was then indebted for costs. The solicitor declined to act further unless he was furnished with money to meet future costs, and the debtor placed 15*l.* in his hands for that purpose. The solicitor then called the debtor's creditors together, and prepared a deed of assignment, which the debtor executed. The debtor was afterwards adjudged bankrupt. At the date of the act of bankruptcy, which, of course, was the execution of the deed of assignment, the solicitor had 12*l.* out of the 15*l.* in his hands, and the question, as far as it is relevant on this occasion, was whether he could hold that 12*l.* given to him for the specific purpose above referred to in part satisfaction of debts owing to him at the date of the act of bankruptcy. Lord Esher M.R. said (5): " At that very moment," —the date of the act of bankruptcy—" the solicitor could not do any work for the bankrupt so as to take away from the trustee the money which was then due to the bankrupt, for the act of bankruptcy put an end to the solicitor's authority to do work for the bankrupt as against the money which he then had in hand. If the authority to do the work is revoked, what is the result,

(1) 9 Ch. D. 568.
(2) 36 Ch. D. 223.
(3) [1908] 1 Ch. 804.
(4) [1893] 1 Q. B. 455.
(5) [1893] 1 Q. B. 457.

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when money has been paid to the person to whom the authority was given for the specific purpose? If he is prevented from carrying out that specific purpose by law, or by the order of the person who was legally entitled to prevent him from doing so, he must pay back the money. When money is paid for a specific purpose, and that purpose is not carried out, the money must be paid back. The solicitor, therefore, was bound to pay this money to the trustee in the bankruptcy." Up to that point Lord Esher M.R. was dealing with the question whether the 12*l.* given for the specific purpose of future costs could be retained in payment of costs incurred after the act of bankruptcy. Then dealing with the question under s. 38 he proceeded (1): "Then comes the question, whether the solicitor is entitled to set off this sum against the 40*l.* due to him from the bankrupt, or to treat the two amounts as 'mutual credits.' There is this difficulty. If the money was given to the solicitor for a specific purpose, then, as between him and the bankrupt, there could not be a set-off; nor as between them could there be any mutual credit. And, as regards the trustee in the bankruptcy, there is this difficulty, that the original credit was between the bankrupt and the solicitor, and the new credit is between the trustee and the solicitor. In other words, the two credits are between different parties, and therefore they are not mutual."

Now the second point is, of course, the question that was decided in the cases I previously referred to, but the point that the liquidator relies on is that it was decided that where money was in the hands of the solicitor-creditor earmarked for a specific purpose at the date of the bankruptcy, then he could not take advantage of s. 38 and claim a set-off in respect of the balance of that sum, because if I understand the judgment right there was a contractual obligation on the part of the solicitor-creditor to return this money to the debtor in so far as it was not used for the specific purpose for which it was paid.

In *In re Mid-Kent Fruit Factory* (2) the facts were very similar. A firm of solicitors acting for the company since its formation were creditors for 325*l.* costs. Prior to the winding-up they were instructed to settle certain claims and were given cheques

(1) [1893] 1 Q. B. 458. (2) [1896] 1 Ch. 567.

for the specific purpose of paying those claims in full in case arrangements could not be made with the creditors. Arrangements were in fact made and the solicitors had a balance of 93*l.* in hand at the date of the winding-up. Vaughan Williams J. held that the solicitors could not claim a set-off under s. 38 unless they could shew that the 93*l.* was retained by them with the knowledge and consent of the company. He said (1): "Certain sums were deposited with the solicitors for certain specific purposes. Mr. Jenkins, who appears for the solicitors, does not deny that so long as the moneys were retained in hand for those purposes there could be no right of set-off; but he says that before the winding-up commenced those purposes had been fulfilled, and the money had been applied, so far as they could be applied, in payment of the creditors who had agreed to take less than the full amount of their debts; that there was no longer any specific purpose to which the money was to be applied; and that from that time forward the money remained in the hands of the solicitors as a debt due to the company; and that the solicitors are entitled to answer the claim of the liquidator by setting off their claim for costs against the balance in their hands. I think Mr. Jenkins would have been right if the money had remained in the hands of the solicitors with the consent or knowledge of the company after the composition and costs had been paid. In that case the 93*l.* would be a mere debt from the solicitors to the company. But the liquidator denies that the money ever did remain in the hands of the solicitors with the consent of the company. Prima facie, the money having been, admittedly, paid to the solicitors to be applied for specific purposes, it would continue in their hands for those purposes, and their duty would be to return the balance. The onus is on the solicitors to shew the company's consent to the money remaining in their hands; and I fail to find that the consent was given, or that the solicitors ever communicated to the company that they had the balance in their hands." Later on he said (2): "The present claim of these solicitors to retain the moneys does not arise out of contract at all. It is a claim to retain moneys, which were paid into their hands for a specific

(1) [1896] 1 Ch. 570. (2) [1896] 1 Ch. 571.

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purpose, for another purpose which was in nowise contemplated by the contract of bailment. . . . . There can be no set-off in this case, because the money was received under a contract of bailment which allotted the money and necessitated the application of it to a specific purpose, and that bailment was never determined, and neither the company nor its liquidator ever consented to the money being held for any purpose other than the one for which it was originally intended."

Now the principle of those two cases is that where a creditor obtains money or has in hand a balance of money paid to him under a separate contract for a specific purpose he cannot and ought not to be allowed to claim a set-off under s. 38 if it involves a breach of the contract under which he obtained the money.

The liquidator contends that these two cases go beyond this and decide that s. 38 does not apply to property actually held by a creditor in trust for his debtor, whether that trust arises from transactions forming part of the general mutual dealings, or not. He relies on *Charles* v. *Jones* (1), where Kay J. said: "I have never heard it doubted that where a mortgagee sells, and has a balance in his hands, he is a trustee of that balance for the persons beneficially interested. He takes his mortgage as a security for his debt, but, so soon as he has paid himself what is due, he has no right to be in possession of the estate, or of the balance of the purchase-money. He then holds them, to say the least, for the benefit of somebody else, of a second mortgagee, if there be one, or, if not, of the mortgagor. What, then, is he to do? Surely he has a duty cast upon him. His duty is to say, 'I have paid my debt: this property which is pledged to me, and in respect of which I now hold this surplus in my hands, is not my property. I desire to get rid of this surplus, and hand it back to the person to whom it belongs.'"

That is no doubt a perfectly sound and accurate statement as to the position of a mortgagee with surplus assets in his hands arising from the realization of his claim after payment of principal, interest, and costs. But the question I have to decide is

(1) 35 Ch. D. 544, 549.

whether the ratio decidendi of *In re Pollitt* (1) and *In re Mid-Kent Fruit Factory* (2) ought to be applied in this case where the respondents received this 856*l.* not on a realization of their security in the ordinary way but by reason of the security having been destroyed by fire and the policy moneys coming to their hands. Apart from those two decisions s. 38 would clearly cover the present case. [His Lordship read the section.] About a fortnight before the winding-up, the respondents received the policy moneys, and after satisfying the balance due to them on the bills of sale they had 856*l.* in hand which they claim to deal with in their account against the company having regard to their general dealings and transactions. There was clear mutuality. It was a debt from them to the company. They owed the company 856*l.* The company owed them 2099*l.* contra in relation to the general dealings.

In order to decide whether the principle of *In re Pollitt* (1) and *In re Mid-Kent Fruit Factory* (2) governs or ought to be extended so as to govern the present case I must have regard to other general statements as to the meaning of the "mutual dealings" section.

In *Eberle's Hotels Co.* v. *Jonas* (3) the plaintiff company deposited cigars with the defendants to secure a debt. An order for winding up the plaintiff company was afterwards made and, the secured debt having been paid off, the liquidator claimed a return of the cigars, and brought an action of detinue. Their value having been assessed, the defendants counterclaimed under s. 38 to set off another debt due from the plaintiff company against that value. It was held that they were not entitled to do so on the ground that s. 38 is only applicable where the claims on each side are such as result in pecuniary liabilities, whereas the right of the plaintiff company was to the return of the goods. The claim of the plaintiff company was for the return of the goods in specie. That was the only point actually decided, but Lord Esher M.R. made certain general observations on the general meaning of s. 38 which ought to guide me very considerably in coming to a conclusion on the present question.

(1) [1893] 1 Q. B. 455. (2) [1896] 1 Ch. 567.
(3) 18 Q. B. D. 459.

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He said (1): "The conclusion at which I have arrived in this case does not depend on the question whether the plaintiffs' claim is one which would be provable in a case of bankruptcy under s. 37 of the Bankruptcy Act, 1883. If such a claim as that made by the plaintiffs were provable under s. 158 of the Companies Act, 1862, and there were no other difficulty in the way, the case might come within the terms of s. 38. But the ultimate question must be whether the facts of this case are such that the provisions of s. 38 can be applicable to them. . . . . Then is this a case of mutual dealings? On the one side there was the deposit of goods to secure a debt. There are, no doubt, matters which give rise to claims, but are not dealings within the section . . . . but I am disposed to think that whatever comes within the description of an ordinary business transaction would be a dealing within the section. I think it was a dealing where one party deposited goods with the other to secure a debt. It is obvious that the sale of goods by the defendants constituted a dealing. So I think there were mutual dealings between these parties. But we have to see whether even so the section applies. . . . . Although there may be mutual dealings, and the parties are such as come within the terms of the section, it is obvious that its provisions cannot apply unless the dealings are such that in the result the account contemplated by the section can be taken in the way described. If the claim on one side in the action and the counter-claim on the other were such as would both result in a money claim, so that for the purposes of the action there would be merely a pecuniary liability on each side, the case would, I think, come within the section. I should, speaking for myself, desire to give the widest possible scope to the section, and, in my opinion, wherever in the result the dealings on each side would end in a money claim, its provisions would be applicable."

Those observations are plainly applicable to the present case, and the only question is whether any limitation is to be put on them. The subsequent decisions of *In re Pollitt* (2) and *In re Mid-Kent Fruit Factory* (3) are sufficiently distinguishable if

(1) 18 Q. B. D. 464, 465. (2) [1893] 1 Q. B. 455.
(3) [1896] 1 Ch. 567.

regarded as cases in which the exercise of the right of set-off would have amounted to a breach of a specific contract, but if, as the liquidator suggests, they are to be extended to include all cases where a creditor holds the balance of a realized security in trust for his debtor so that the creditor is not entitled to deal with it in his account, that extension would form a serious limitation on the general rule in *Eberle's Hotels Co.* v. *Jonas* (1), and I can find no justification for any such limitation in those decisions.

The liquidator pointed out that in the same case Fry L.J. said (2): "If we had taken a different view of the point on which our judgment turns"—i.e., if we were entitled to regard the value of the cigars as a value in money or as a sum of money rather than as a specific chattel—"I think it would have been necessary very carefully to consider whether s. 38 applies to the case of a specific security given for a specific debt. The defendants in substance contend that they are entitled to add the debt of 280*l.* to the 600*l.* secured by the deposit of the cigars. I think it would require very mature consideration before we could decide in favour of that contention." Fry L.J. was here dealing with the question of tacking an unsecured debt to a security existing at the time of the liquidation, and I do not think he was dealing at all with a case where the security had been put an end to and the secured debt paid before the liquidation and the creditor had a surplus in hand which apart from the question of s. 38 he would clearly have had to return to his debtor. I think this is borne out by the rest of the judgment, in which Fry L.J. said: "The general course of practice both in bankruptcy and the winding-up of companies is intended to maintain the full rights of secured creditors to their security, if they choose to stand outside the proceedings. But it would be necessary to consider whether the language of the judgment in *Ex parte Caldicott* (3) does not indicate that the view of the judges who decided that case was that the Legislature never intended by s. 38 to enlarge the rights of secured creditors so as to enable them to tack sums not secured to the sums secured. I express no opinion on this point.

(1) 18 Q. B. D. 465. (2) 18 Q. B. D. 470.
(3) 25 Ch. D. 716.

ASTBURY J. I only wish to say that I think it will require much consideration whenever it becomes necessary to decide it."

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Now *Ex parte Caldicott* (1) has really no bearing on the present point. A father and son were partners in business. The father mortgaged his separate real estate to the firm's bankers to secure the firm's current account. He subsequently contracted to sell the real estate. The bankers joined in the conveyance on the terms that the father should deposit the purchase-money with them in his own name at interest by way of security for the firm's current account and should not withdraw the capital until the firm's debt was paid. It was held that, the arrangement being a bona fide one for the purpose of giving a security to the bankers in substitution for their security on the real estate, the bankers could prove in the liquidation of the father and son against "the joint estate" for the full amount of their debt, without deducting the deposit, and that no set-off arose under s. 39 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71). Earl Selborne L.C. said (2): "Sect. 39 has no application to a bona fide security; and we all agree in thinking that this arrangement was a bona fide one for the purpose of giving the bank a security. . . . . It appears to me a fallacy to say that the money so deposited was a debt due from the bank to the father, in the sense that an action could have been brought by him for it, so long as it remained in the hands of the bank, and there was a balance due from the firm to them which the mortgage of the real estate was intended to secure; and I cannot think that the conversion of the security into money, and the deposit with the bank of the money, which continued to be the subject of the security, can make any difference in principle." In that case there was obviously in fact a contract between the father and the bank that the bank were to hold the money as security for the firm's debt, and the contention that it was payable to the father involved a breach of that contract. Earl Selborne L.C. continued (3): "It is admitted that, if the money did remain a security, the bank were not obliged to deduct its value before proving their debt against the estate of the firm, because the

(1) 25 Ch. D. 716. (2) 25 Ch. D. 721, 722.

(3) 25 Ch. D. 722.

rule in bankruptcy is, that a valuation or giving up of a security is only necessary when, in the case of a proof by joint creditors, it is a security on the joint estate. Well, this is not a security on the joint estate, and, being in substance, as it is in terms, a security, the principles which are applicable to securities, and not those which apply to mutual credits, appear to me to govern the case."

I think I am entitled to have regard to the essence of this judgment in considering whether the observations of Fry L.J. in *Eberle's Hotels Co.* v. *Jonas* (1) can have been intended to conflict with the view I have formed as to the general statement of the law laid down in that case, and for the reasons I have stated I do not think they were so intended. There is one other passage in that case to which I must refer as it bears out a passage I have already read from the judgment of North J. in *In re Gregson.* (2) Lord Esher M.R. said (3): " These cigars were deposited to secure a debt with power to sell them at once, even before default in payment of the monthly instalments. If the defendants had sold them before the debt was paid, I am disposed to think that the plaintiffs' claim for an account of their proceeds would then have been a mere money claim."

I think I ought to give weight to that expression of opinion and the general reasoning in *Eberle's Hotels Co.* v. *Jonas* (4) and to the actual wording of s. 38, and I ought not to regard *In re Pollitt* (5) and *In re Mid-Kent Fruit Factory* (6) as governing every case where a creditor who has a current account with a debtor and who in the course of his business has taken a security has a surplus in his hands after satisfying that security. In the present case there was clear mutuality and no specific contract ousting the application of s. 38. There will therefore be a set-off under the general rule in *Eberle's Hotels Co.* v. *Jonas.* (4) It is therefore not really necessary to deal with the second point. [His Lordship then held on the evidence that there had been in fact no knowledge or consent on the part of the company to the

(1) 18 Q. B. D. 470.
(2) 36 Ch. D. 227.
(3) 18 Q. B. D. 466.
(4) 18 Q. B. D. 459.
(5) [1893] 1 Q. B. 455.
(6) [1896] 1 Ch. 567.

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respondents' appropriation of the 856*l.* to their general account and continued :] I therefore decide the case on the first point.

Solicitors : *Druces & Attlee ; Busk, Mellor & Norris, for Sale & Co., Manchester.*

G. R. A.

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In re BENTLEY.

PUBLIC TRUSTEE *v.* BENTLEY.

[1914 B. 1460.]

Trustee—Public Trustee—Income Fee—Incidence—Life Annuities — Public Trustee Act, 1906 (6 *Edw.* 7, *c.* 55), *ss.* 9, 15—*Public Trustee* (*Fees*) *Order*, 1912, *r.* 1 ; *Schedule* (*Division III.*).

The income fee payable to the Public Trustee in respect of life annuities bequeathed by a will is payable out of those annuities and not out of residue.

ORIGINATING SUMMONS.

By her will dated April 16, 1910, a testatrix, after appointing certain persons her executors and trustees and bequeathing certain pecuniary and specific legacies, bequeathed four life annuities amounting to 310*l.* a year and proceeded : "And I authorize my trustees to provide for the payment of the said annuities either by appropriating for that purpose a fund which shall consist of stocks funds shares or securities hereinafter authorized as investments and of which the annual income at the time of appropriation shall be sufficient to answer such annuities with power in case of the income of the appropriated fund at any time proving insufficient to resort to the capital fund for payment of such annuities and so that upon the death of each of the said annuitants a proportionate part of the capital of the same fund or so much thereof as shall not have been resorted to as aforesaid shall in any case revert to and form part of my residuary estate or by purchasing like annuities in the names of the annuitants respectively or in the names of my trustees from the Government or any public company to be applied accordingly. And until the said annuities respectively

shall be provided for in one or other of the modes aforesaid I direct that the same shall be paid out of the income of my residuary estate. But I declare that when and so soon as any such annuity shall have been so provided for such provision shall be a complete satisfaction of the trusts to provide for the same annuity which shall thereafter cease to be charged upon either the income or the capital of my residuary estate . . . . I further direct that all duties payable in respect of the pecuniary or specific legacies aforesaid or in respect of any of the annuities aforesaid shall be paid out of my residuary personal estate."

The testatrix then devised her residuary real and personal estate to her trustees upon trust for sale and conversion and directed them out of the proceeds to pay her funeral and "testamentary expenses," debts, and legacies and "make provision for payment of the said annuities" and "pay the legacy and other duty on legacies or annuities bequeathed free of duty" and to invest the residue in the stocks, funds, shares, or securities therein mentioned and to hold the same upon trust for certain residuary legatees, two shares being settled and one being given absolutely.

The testatrix died on October 28, 1912, and on February 8, 1913, administration with the will annexed was granted to the Public Trustee, the executors having renounced and disclaimed.

In November, 1913, the Public Trustee appropriated investments producing 310*l.* 4*s.* 10*d.* gross income to answer the four annuities which admittedly had to bear their own income tax. He had partly distributed the third share of residue given absolutely, and the balance of that share was now distributable. In the events that had happened he now held the other two third shares producing about 156*l.* gross income in trust for the defendant Clement Bentley for life with remainder to certain remaindermen.

On May 1, 1914, the Public Trustee issued this summons to determine (inter alia) whether the 2*l.* per cent. income fee payable to him in respect of the annuities ought to be borne by those annuities or by the income or capital of the residue.

He had in fact commuted the income fee on the annuities as

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from December 1, 1913, at 56*l.* and charged it in equal thirds to the income of the three shares of residue. The defendant Bentley did not assent to this commutation and the Public Trustee was willing to readjust it according to the Court's decision.

Percy Wheeler, for the Public Trustee. The question depends on the Public Trustee Act, 1906, and the Public Trustee (Fees) Order, 1912. (1) The Public Trustee treated the income fee on the annuities as payable out of residue. He commuted it at 56*l.* and charged it to income. If he was wrong it can readily be adjusted.

Hon. Frank Russell, K.C., and *A. M. Begg*, for Clement Bentley, the life tenant of two thirds of the residue. The annuities must clearly bear their own income fee. If, however, we are wrong, and it is to be borne by residue, it must prima facie be paid out of income as it accrues, and any commutation

(1) The Public Trustee Act, 1906, provides as follows:—

Sect. 9, sub-s. 1: "There shall be charged in respect of the duties of the Public Trustee such fees, whether by way of percentage or otherwise, as the Treasury with the sanction of the Lord Chancellor may fix, and such fees shall be collected and accounted for by such persons, and in such manner, and shall be paid to such account, as the Treasury direct."

Sub-s. 2: "Any expenses which might be retained or paid out of the trust property if the Public Trustee were a private trustee shall be so retained or paid, and the fees shall be retained or paid in the like manner as and in addition to such expenses."

Sub-s. 5: "The incidence of the fees and expenses under this section as between capital and income shall be determined by the Public Trustee."

Sect. 15: "In this Act, unless the context otherwise requires, ... the expression 'trust property' shall include all property in the possession or under the control wholly or partly of the Public Trustee by virtue of any trust: . . . . the expression 'expenses' includes costs and charges: . . . ."

The Public Trustee (Fees) Order, 1912 (*Weekly Notes*, 1912, p. 187; Current Index, 1912, p. clxix.), provides as follows:—

Rule 1: "In this Order and in the schedule hereto (unless the context otherwise requires):— . . . . (*c*) The expression 'income of the trust property' includes any income arising under the trust."

Division III. of the schedule provides the following "income fees in respect of the duties of the Public Trustee, acting in any of the capacities mentioned under division II." —i.e., as ordinary trustee or executor or administrator, &c.:—

"Upon the annual income of the trust property (where that income is not less than 2*l.*), a fee at the rate of 2*l.* per cent. in respect of that income up to 500*l.*," with modifications for higher amounts.

in respect thereof must be apportioned between the income and capital of the residue on an actuarial basis.

John Beaumont, for the remaindermen. The annuitants get the security of the Consolidated Fund and clearly ought to bear their own income fee. The Public Trustee is treating it as if it were costs of collection and throwing it on residue. That is not the true position. It is really a statutory charge on the income, like income tax, and must be borne by the income on which it is charged.

Beddall, for the annuitants. The income fee is an administration expense and ought to fall on residue. The appropriation does not affect the question. It cannot alter the incidence of the fee, though it might have been simpler to have made an appropriation sufficient to cover the fee instead of leaving it to be collected out of the balance of residue. In discussing the general principle it may be disregarded.

The general principle is that all administration expenses fall on residue. The fact that the annuitants get the security of the Consolidated Fund is immaterial. They would equally get that security in a Court administration, but the expenses would fall on residue. Suppose a private trustee were given remuneration by the will, or suppose he had to pay a commission for rent collection, either of those expenses would fall on residue. If income fees are to be charged on annuities, capital fees must be charged on legacies. Such a contention is quite untenable. In the present case "testamentary expenses" are expressly thrown on residue. These must include the income and capital fees.

Sect. 9, sub-s. 2, provides that any expenses which might be retained or paid out of the trust property if the Public Trustee were a private trustee shall be so retained or paid "and the fees shall be retained or paid in the like manner as and in addition to such expenses." Now a private trustee could only retain his expenses including his costs and charges out of residue, and the fees are to be retained "in the like manner" as such expenses and in addition thereto. The fees must therefore be retained out of residue.

Hon. Frank Russell, K.C., in reply. Sect. 9, sub-s. 1, does not

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merely direct payment of fees but payment according to the rules, i.e., in the case of the income fee by a percentage on the income of the trust property which includes the annuities. That is a statutory charge on the entire income and must be borne rateably. There is nothing in sub-s. 2 to throw the charge on residue. It is thrown on the trust property as defined in s. 15. The words "in the like manner" merely point to payment "out of the trust property." They do not touch the question of incidence of the fees as between annuities and residue.

ASTBURY J. I have no authority to guide me in this case, but prima facie I should have thought that the income fee from its very name ought to come out of the pocket of the person receiving the income. It is really a fee to recoup the Public Trustee for seeing to the investments and paying the income to the life tenant of residue or the annuitants as the case may be. I think the fair thing is to pay the income fee attributable to the annuities out of those annuities and the income fee attributable to the balance of the income out of that balance, and I so decide. The matter must be readjusted on that footing as from the testatrix's death, as my decision applies equally to the period before appropriation as to the period after appropriation. It is admitted on all hands that the commutation cannot stand, and the Public Trustee is ready to readjust that matter. I think this is the fairest decision I can give in the absence of anything further to guide me.

Solicitors: *G. & G. Keith; Duffield, Bruty & Co.*

G. R. A.

In re ROBIN ELECTRIC LAMP COMPANY, LIMITED. WARRING-TON J. 1914 July 6.

Patent—Petition for Compulsory Licence—Form of Opposition—Grounds stated—Petition referred to the Court—Particulars of Grounds of Opposition—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *s.* 24—*Patents Rules*, 1908, *rr.* 68—74—*Rules of the Supreme Court*, 1883, *Order* XIX., *rr.* 6 *and* 7; *Order* LIIIA, *rr.* 2, 7.

When a petition for the grant of a compulsory licence has been referred to the Court by the Board of Trade pursuant to s. 24 of the Patents and Designs Act, 1907, the petitioner is not entitled to particulars of the grounds of opposition stated in any notice of opposition given by the patentee pursuant to r. 70 of the Patents Rules, 1908, the grounds of opposition stated in such notice being matter for the consideration of the Board of Trade alone and not a proceeding under the petition when it has been referred to the Court.

ADJOURNED SUMMONS.

The applicants, the Robin Electric Lamp Company, were the holders of a patent No. 20,277 of 1904 for an invention of improved manufacture of incandescent bodies for electric glow lamps, and presented a petition to the Board of Trade under s. 24 of the Patents and Designs Act, 1907, that an order might be made granting to them a compulsory licence to exercise and use Tungsten wire in accordance with the inventions covered by certain patents known as the Association patents on payment of such royalties as might be deemed reasonable.

The Association patents belonged in part to the British Thomson-Houston Company and in part to Messrs. Siemens Brothers & Co. Each of these companies gave notice of opposition pursuant to r. 70 of the Patents Rules, 1908.

By their notice of opposition the British Thomson-Houston Company stated (inter alia) the following grounds of opposition:

"(3.) We have granted licences on reasonable terms to manufacture and sell the patented article and to carry on the patented process to Siemens Brothers & Co. and to the Osram Lamp Works."

"(4.) We have granted licences on reasonable terms to sell electric incandescent lamps wherein the patented article is used to the Edison and Swan United Electric Light Company."

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"(7.) The demand for the patented article or the articles produced by the patented process has been and is reasonably met."

"(8.) Lamps manufactured under our said letters patent by us and by our licensees are sold to the trade and the public at reasonable prices . . . ."

"(9.) The applicants are seeking to obtain a licence on terms more favourable than those granted to our existing licensees."

"(13.) . . . . Double filament lamps of the kind referred to and with efficient means of effecting the operations specified in the applicants' specification have been well known for at least twenty years, and lamp manufacturers have been prepared to manufacture and supply the same if they had been required . . . ."

"(14.) The applicants' letters patent are invalid."

"(15.) The statements contained in the petition are inaccurate and misleading."

The notice of opposition by Siemens Brothers & Co. was in identical terms, except that in paragraph 3 the licensees named were the British Thomson-Houston Company and the Osram Lamp Works.

The Board of Trade considered the petition and, being satisfied that a prima facie case had been made out, by an order dated June 8, 1914, referred the petition to the Court.

On June 25, 1914, the petitioners took out this summons asking that the opponents might be ordered to deliver particulars in writing of the grounds of opposition referred to in the notices of opposition "filed herein by them" by stating:

(1.) As to paragraph 3 thereof (*a*) what licences were referred to and (*b*) the terms upon which the licences referred to had been granted to the licensees.

(2.) As to paragraph 4 thereof (*a*) what licences were referred to and (*b*) the terms upon which the licences referred to had been granted to the Edison and Swan United Electric Light Company.

(3.) As to paragraph 7 thereof how and in what manner the demand for the patented article and articles produced by the patented process had been and was reasonably or at all met.

(4.) As to paragraph 8 thereof the prices at which lamps

therein referred to were sold (*a*) to the trade and (*b*) to the public.

(5.) As to paragraph 9 thereof how and in what respect the terms sought by the applicants were more favourable than those granted to existing licensees.

(6.) As to paragraph 13 thereof (*a*) what means for effecting the operations specified in the applicants' specification were provided in the double filament lamps referred to, and (*b*) the names and business addresses of the manufacturers who it is alleged have been prepared to manufacture and supply such lamps.

(7.) As to paragraph 14 thereof the grounds upon which it was alleged that the applicants' letters patent were invalid.

(8.) As to paragraph 15 thereof which of the statements contained in the petition were alleged to be inaccurate and misleading and in what respect the same were alleged to be inaccurate and misleading.

Cave, *K.C.*, and *R. Frost*, for the petitioners. The petitioners are entitled to the particulars asked. The material enactment and rules are s. 24 of the Patents and Designs Act, 1907, rr. 68—74 of the Patents Rules, 1908, and rr. 2 and 7 of Order LIIIA of the Rules of the Supreme Court. (1) By s. 24 of the Patents and Designs Act, 1907, a petition for the grant of a compulsory licence is presented in the first instance to the Board of Trade. The procedure is regulated by rr. 68 to 74 of the Patents Rules, 1908, and by r. 70 the opponents may give notice of opposition on Patents Form No. 21, a side-note to which form requires them to "state fully the grounds of opposition." By s. 24, sub-s. 2, if the Board of Trade are satisfied that a prima facie case has been made out they are directed to refer the petition to the Court, and r. 74 provides that they shall refer it accordingly together "with copies of any affidavits, statutory declarations, or other documentary evidence which may have been furnished under the foregoing rules." Rule 2 of Order LIIIA of the Rules of the Supreme Court provides that the Rules of the Supreme Court shall apply to all proceedings under the Patents and Designs Act, 1907, and r. 7 (*d*)

(1) See note, p. 471, post.

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provides that the petition shall be heard by the Court as a witness action. The provisions of Order XIX., rr. 6 and 7, are therefore applicable to the case, and the opponents' notices of opposition are a "pleading, notice or written proceeding requiring particulars" within the scope of r. 7. Paragraphs 3, 4, 7, 8, 9, 13 and 14 of the notices of opposition in the present case all contain general allegations in respect of which according to the ordinary practice of the Court further and better particulars should be furnished. [They also referred to rr. 16 and 17 of Order LIIIA.]

Walter, K.C., and *J. Hunter Gray*, for the British Thomson-Houston Company. The notice of opposition is not a proceeding under the petition in respect of which particulars can be required. The petition comes in the first instance before the Board of Trade, and r. 70 makes it entirely optional on the part of the opponent to give any notice of objection. If he chooses to do so the grounds of opposition stated in his notice are matter for the consideration of the Board, but in case the Board considers that a prima facie case is made out and refers the petition to the Court, the effect of the notice of opposition is spent, and when the petition comes before the Court the petitioner is bound to make out his own case without any assistance from the respondent. The notice of opposition therefore is not a "pleading, notice or written proceeding" within r. 7 of Order XIX. The Legislature never intended that a person claiming to be "interested" within the meaning of s. 24 should be entitled to require details of the patentee's business, and such a power if it existed might be open to the greatest abuse. The duty of a petitioner to make out his own case for the revocation of a patent under s. 27, which relates to the revocation of a patent worked exclusively or mainly outside the United Kingdom, is stated in *In re Hatschek's Patents* (1), and there is no difference in this respect between s. 24 and s. 27.

Colefax, K.C., and *G. H. Hume*, for Siemens Brothers & Co., supported the same arguments.

Cave, K.C., in reply.

(1) [1909] 2 Ch. 68, 93; 26 Rep. Pat. Cas. 228, 245, 246, per Parker J.

WARRINGTON J. This is no doubt a very important application, and if my decision had been the reverse of that which I am about to give I should certainly have reserved judgment.

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The application is for particulars in writing of the grounds of opposition referred to in the notices of opposition which in the summons are stated, and in my opinion, as will presently appear, wrongly stated, to have been "filed herein," that is to say, in the matter of the petition—an expression which suggests that the documents in respect of which the particulars are required are filed in the proceedings in which the application is made. The question arises upon a petition presented to the Board of Trade under s. 24 of the Patents and Designs Act, 1907, for a compulsory licence. That section provides by sub-s. 1, "Any person interested may present a petition to the Board of Trade alleging that the reasonable requirements of the public with respect to a patented invention have not been satisfied, and praying for the grant of a compulsory licence, or, in the alternative, for the revocation of the patent"; and by sub-s. 2, "The Board of Trade shall consider the petition, and if the parties do not come to an arrangement between themselves the Board of Trade, if satisfied that a prima facie case has been made out, shall refer the petition to the Court, and, if the Board are not so satisfied, they may dismiss the petition." Pausing there for a moment, the function of the Board of Trade is not finally to determine that a compulsory licence shall be granted; all that the Board of Trade can do is, if a prima facie case is made out, to refer it to the Court to determine whether the case is actually made out. If the Board of Trade comes to the conclusion that no prima facie case is made out, then it has the power of dismissing the petition, but it can give no final decision in favour of the petitioner. The Act then provides in sub-s. 3, "Where any such petition is referred by the Board of Trade to the Court, and it is proved to the satisfaction of the Court that the reasonable requirements of the public with reference to the patented invention"—that is, the patented invention referred to in the petition—"have not been satisfied, the patentee may be ordered by the Court to grant licences on such terms as the Court may think just, or, if the Court is of opinion that the

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reasonable requirements of the public will not be satisfied by the grant of licences, the patent may be revoked by order of the Court." Then follows an immaterial proviso which I need not read. Sub-s. 4 provides, "On the hearing of any petition under this section the patentee and any person claiming an interest in the patent as exclusive licensee or otherwise shall be made parties to the proceeding, and the law officer or such other counsel as he may appoint shall be entitled to appear and be heard." Pausing there for a moment, I think that sub-ss. 3 and 4 relate exclusively to the proceedings before the Court, and have nothing to do with proceedings before the Board of Trade. Then comes sub-s. 5, "For the purposes of this section the reasonable requirements of the public shall not be deemed to have been satisfied"—I think that really means "shall be deemed not to have been satisfied"—"(*a*) if by reason of the default of the patentee to manufacture to an adequate extent and supply on reasonable terms the patented article, or any parts thereof which are necessary for its efficient working, or to carry on the patented process to an adequate extent or to grant licences on reasonable terms, any existing trade or industry or the establishment of any new trade or industry in the United Kingdom is unfairly prejudiced, or the demand for the patented article or the article produced by the patented process is not reasonably met." I will go back for one moment to sub-s. 3. That which the petitioner has to prove, namely, "that the reasonable requirements of the public with reference to the patented invention have not been satisfied," is to be proved in the way pointed out by sub-s. 5, that is to say, the petitioner has to prove that an "existing trade or industry or the establishment of any new trade or industry in the United Kingdom is unfairly prejudiced, or the demand for the patented article or the article produced by the patented process is not reasonably met," and he has to prove that that result comes about from the fact of the default of the patentee in doing those things which are mentioned in the earlier part of clause (*a*) of the sub-section. The reasonable requirements of the public may also be shewn not to have been satisfied in the manner specified in clause (*b*) of sub-s. 5, namely, "if any trade or industry in the United Kingdom is

unfairly prejudiced by the conditions attached by the patentee before or after the passing of this Act to the purchase, hire, or use of the patented article or to the using or working of the patented process."

I have dealt with s. 24 in some detail for this reason, that I desire to say that in my opinion it shews in emphatic language that the onus is to be thrown upon the petitioner. It is the petitioner who has to prove "to the satisfaction of the Court that the reasonable requirements of the public with reference to the patented invention have not been satisfied" by reason of the facts mentioned in sub-s. 5.

The Board of Trade have made certain rules regulating their procedure under the Act of 1907, and the rules relating to s. 24 are rr. 68 to 74 inclusive. Rule 68 deals with the form and contents of the petition. Rule 69 provides that the petition is to be left at the office and shall be accompanied "by affidavits or statutory declarations in proof of the allegations contained in the petition together with any other documentary evidence in support," and that the petitioner is to "deliver to the patentee and any other person who is alleged in the petition to have made default, copies of the petition and of such affidavits or statutory declarations and other documentary evidence in support." Rule 70 is as follows: "The persons to whom such copies are delivered by the petitioner may give notice of opposition on Patents Form No. 21, and may, within fourteen days after being invited to do so by the Board, leave at the office their affidavits or statutory declarations in answer, and if they do so shall deliver copies thereof to the petitioner; and the petitioner may within fourteen days from such last mentioned delivery leave at the office his affidavits or statutory declarations in reply, and if he does so shall deliver copies thereof to the patentee or any other person alleged in the petition to have made default, such last mentioned affidavits or statutory declarations being confined to matters strictly in reply." I pause there for a moment. The language of the rules referring to what the petitioner is to do and the language of the rules referring to what the patentee and the other persons in the same position as the patentee, whom I may call respondents for the moment, are

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to do are in a different form. In the first case the form is obligatory, in the second case it is permissive, and that for a very good reason, because it is the petitioner who has to make out the prima facie case; the respondent may if he pleases sit still and leave the matter to be dealt with by the Board of Trade upon the petition and the affidavits in support, and he probably would do so unless he hoped to convince the Board of Trade that the proper course to deal with the petition would be to dismiss it. Unless he desires to persuade the Board of Trade to dismiss the petition, it does not matter to him what order the Board of Trade makes, because if it does not dismiss the petition the only order it can make is to refer the petition to the Court. Then there are some intermediate rules which I need not read. Rule 74 deals with "reference of petition to the Court" and provides, in effect, that if a prima facie case is made out the Board of Trade "shall refer the petition to the Court, with copies of any affidavits, statutory declarations, or other documentary evidence which may have been furnished under the foregoing rules, and with certified copies of all entries in the Register of Patents relating to the patent in question and any other information in the possession of the Board which it appears to them may be of service to the Court in ascertaining what persons should be made parties to the proceedings before the Court, and the Board shall give written notice to the parties that the petition has been referred to the Court." What is it, therefore, which the Board of Trade refers to the Court? It is the petition together with copies of the affidavits, statutory declarations, and documentary evidence furnished under the foregoing rules and any information likely to be of service to the Court in ascertaining who are the proper persons to make parties to the proceedings before the Court. There is no reference there to the grounds of opposition, and it seems to me that these rules provide merely for the optional delivery of the grounds of opposition if the patentee chooses to deliver them for the information of the Board of Trade and for no other reason whatever.

I need not go into the details of the petition for the present purpose. The petitioners in the present case complain amongst other things that the patentees have made default in granting

licences on reasonable terms. The patentees put in before the Board of Trade a notice of their grounds of opposition in accordance with the form annexed to the Board of Trade Rules, and they stated certain affirmative grounds with which I need not deal in detail. I will only deal with that one which has been most insisted on in argument as affording a reason for particulars. They say in paragraph 3 " We have granted licences on reasonable terms to manufacture and sell the patented article and to carry on the patented process to the British Thomson-Houston Company and the Osram Lamp Works." Those are the particulars given by Messrs. Siemens Brothers. Those given by the British Thomson-Houston Company are in the same terms except that Siemens Brothers are substituted for themselves as licensees. It is in reference to that statement that the petitioners ask for particulars of what licences have been granted and what are the terms on which they have been granted.

The Rules of the Supreme Court which are relevant to the question are found first in Order LIIIA, r. 2 of which provides: " The Rules of the Supreme Court for the time being in force shall apply, so far as may be practicable (unless by the Act or by these rules otherwise expressly provided), to all proceedings before the Court under the Act"; and r. 7 of the same Order, which deals with these petitions referred by the Board of Trade under s. 24 of the Act, contains two provisions and two only which are material to the present application, clause (*c*), which says that the petition is to " be set down in the same manner as if it were a witness action," and clause (*d*), which says that " the petition shall be heard by the Court as a witness action and shall come on in due course in the witness list." The only other Rules of the Supreme Court which are relevant to the present question are rr. 6 and 7 of Order XIX. Rule 6, reading it shortly, provides that " In all cases in which . . . . particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading"; and r. 7 provides, " A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding requiring particulars, may in all cases be

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ordered, upon such terms, as to costs and otherwise, as may be just."

The case made by the petitioners on this point is that the grounds of opposition delivered to the Board of Trade are a "written proceeding requiring particulars," and are in effect to be treated as the defence to the petition, that the petition is to be heard as a witness action, and that therefore the Court ought to deal with it in the same way as it would deal with a witness action coming before it upon pleadings of the ordinary kind. In my opinion the first and, if I am right, the complete answer to the petitioners' case is that the grounds of opposition are not a "written proceeding requiring particulars" at all. In my opinion the grounds of opposition are not a "proceeding" for the purposes of the Rules of the Supreme Court. They are never properly before the Court at all. That with which the Court has to deal is the petition. The petition comes before the Court as a witness action and it comes on in the same way as any other petition which requires no answer in the way of pleading on the part of the respondent. The notice of opposition is nothing but the information afforded to the Board of Trade of the grounds upon which the patentee asks the Board of Trade to say that no prima facie case is made out; and in my opinion there is a very good practical reason why the grounds of opposition given to the Board of Trade should not be treated as a pleading in respect of which the patentee is bound to give particulars, and the reason is this: under s. 24 of the Act these petitions may be presented by "any person interested." The phrase is extremely vague. It is not so wide as that which is used in s. 27, which enables a petition to be presented by "any person" for revocation of a patent on the ground that the patent has been worked exclusively or mainly outside the United Kingdom, but still it is a very wide phrase. The person who presents the petition under s. 24 has only to allege that he is "interested" and he may then present this petition for a compulsory licence, and in my opinion it would be extremely hard upon a patentee and upon other persons working the patent under him if before the petitioner has proved his case to the satisfaction of the Court the patentee were required to

give such information as that which is asked for by these particulars.

Then it is said that the petitioner must know the case which he has to meet. The answer is that the petitioner has no case to meet at all. The petitioner under s. 24 has to make out his own case. If on the hearing of the petition the respondents feel it necessary to do something more than to merely rest on a general denial of the petitioner's case or on the failure of the petitioner to make out his case and set up an affirmative case of their own, it will then be for the judge hearing the petition to determine what it is just and right to do in the way of requiring the respondents to formulate their case and the mode in which they shall so formulate it, but at present it seems to me that with regard to these petitions it is of the utmost importance that the intention of the Act should be strictly adhered to, namely, that a person who presents a petition under this section should make out his own case.

For these reasons I think I must refuse the application for particulars, and the costs of this application will be the respondents' in any event.

Solicitors: *Ashurst, Morris, Crisp & Co.; Bristows, Cooke & Carpmael.*

NOTE.—Patents and Designs Act, 1907, s. 24: "(1.) Any person interested may present a petition to the Board of Trade alleging that the reasonable requirements of the public with respect to a patented invention have not been satisfied, and praying for the grant of a compulsory licence, or, in the alternative, for the revocation of the patent.

"(2.) The Board of Trade shall consider the petition, and if the parties do not come to an arrangement between themselves the Board of Trade, if satisfied that a prima facie case has been made out, shall refer the petition to the Court, and, if the Board are not so satisfied, they may dismiss the petition.

"(3.) Where any such petition is referred by the Board of Trade to the Court, and it is proved to the satisfaction of the Court that the reasonable requirements of the public with reference to the patented invention have not been satisfied, the patentee may be ordered by the Court to grant licences on such terms as the Court may think just, or, if the Court is of opinion that the reasonable requirements of the public will not be satisfied by the grant of licences, the patent may be revoked by order of the Court.

"Provided that an order of revocation shall not be made before the

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expiration of three years from the date of the patent, or if the patentee gives satisfactory reasons for his default.

"(4.) On the hearing of any petition under this section the patentee and any person claiming an interest in the patent as exclusive licensee or otherwise shall be made parties to the proceeding, and the law officer or such other counsel as he may appoint shall be entitled to appear and be heard.

"(5.) For the purposes of this section the reasonable requirements of the public shall not be deemed to have been satisfied—

"(*a*) If by reason of the default of the patentee to manufacture to an adequate extent and supply on reasonable terms the patented article, or any parts thereof which are necessary for its efficient working, or to carry on the patented process to an adequate extent or to grant licences on reasonable terms, any existing trade or industry or the establishment of any new trade or industry in the United Kingdom is unfairly prejudiced, or the demand for the patented article or the article produced by the patented process is not reasonably met; or

"(*b*) if any trade or industry in the United Kingdom is unfairly prejudiced by the conditions attached by the patentee before or after the passing of this Act to the purchase, hire, or use of the patented article or to the using or working of the patented process.

"(6.) An order of the Court directing the grant of any licence under this section shall, without prejudice to any other method of enforcement, operate as if it were embodied in a deed granting a licence and made between the parties to the proceeding."

Patents Rules, 1908, r. 68: "A petition to the Board for an order under section 24 of the Act shall be made on Patents Form No. 20 and shall show clearly the nature of the petitioner's interest and the ground or grounds upon which he claims to be entitled to relief, and shall state in detail the circumstances of the case, the terms upon which he asks that an order may be made, and the purport of such order, and the name and address of the patentee and any other person who is alleged in the petition to have made default."

Rule 69: "The petition and an examined copy thereof shall be left at the office with a request on Patents Form No. 19 and shall be accompanied by affidavits or statutory declarations in proof of the allegations contained in the petition together with any other documentary evidence in support, and the petitioner shall simultaneously with, or as soon as may be after the leaving of such petition deliver to the patentee and any other person who is alleged in the petition to have made default, copies of the petition and of such affidavits or statutory declarations and other documentary evidence in support."

Rule 70: "The persons to whom such copies are delivered by the petitioner may give notice of opposition on Patents Form No. 21, and may, within fourteen days after being invited to do so by the Board, leave at the office their affidavits or statutory declarations in answer, and if they do so shall deliver copies thereof to the petitioner; and the petitioner may within

fourteen days from such last mentioned delivery leave at the office his affidavits or statutory declarations in reply, and if he does so shall deliver copies thereof to the patentee or any other person alleged in the petition to have made default, such last mentioned affidavits or statutory declarations being confined to matters strictly in reply.

"The times prescribed by this rule may be altered or enlarged by the Board, if they think fit, upon such notice to parties interested and upon such terms, if any, as they may direct."

Rule 71: "No further evidence than as aforesaid may be left by either side at the office except by leave or on requisition of the Board and upon such terms, if any, as the Board may think fit."

Rule 72: "The Board shall consider the petition and the evidence, with a view to satisfying themselves whether a prima facie case has been made out for proceeding further with the petition, and if they are not so satisfied they shall dismiss the petition."

Rule 73: "If they are so satisfied, they shall consider whether there is any probability of an arrangement being come to between the parties, and if it appears to them that there is any reasonable probability that such an arrangement can be come to, they may take such steps as they consider desirable to bring it about, and in the meanwhile may defer the reference of the petition to the Court."

Rule 74: "If the Board are not of opinion that there is a reasonable probability of any arrangement being come to between the parties and are satisfied that a prima facie case has been made out by the petitioner, they shall refer the petition to the Court, with copies of any affidavits, statutory declarations, or other documentary evidence which may have been furnished under the foregoing rules, and with certified copies of all entries in the Register of Patents relating to the patent in question and any other information in the possession of the Board which it appears to them may be of service to the Court in ascertaining what persons should be made parties to the proceedings before the Court, and the Board shall give written notice to the parties that the petition has been referred to the Court."

Patents Form No. 21 (entitled "Form of opposition to petition for grant of compulsory license or revocation of patent under section 24") runs: "I (or we) . . . . hereby give notice of opposition to the petition of . . . . for the grant of a compulsory license under Patent No. . . . . of 1 . . . . , or in the alternative, for the revocation of the said patent. The grounds upon which I (or we) oppose the said application are as follows viz.:—[Here state fully the grounds of opposition] . . . ."

Order LIIIA (added June 3, 1908), r. 1: "In this Order:—'The Act' means the Patents and Designs Act, 1907 . . . ."

Rule 2: "The Rules of the Supreme Court for the time being in force shall apply, so far as may be practicable (unless by the Act or by these rules otherwise expressly provided), to all proceedings before the Court under the Act. In particular, if the Court is for the time being a judge of the Chancery Division, the provisions of Order 5, rule 9 (A) shall apply to all such proceedings, as being business assigned to the Court within the meaning of that rule."

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Rule 7: "In all petitions referred by the Board of Trade to the Court under section 24 of the Act the following rules shall apply:—

"(*a*) No evidence shall be given upon any issues other than those raised upon the original petition before the Board of Trade.

"(*b*) Every person who has given notice of opposition in accordance with the Patents Rules, 1908, shall be entitled to be heard on such petition and the Court may direct the petition to be served or notice thereof to be given to such other person or persons as may be thought desirable.

"(*c*) The petition shall if and so long as the Court be a judge of the Chancery Division and subject to any direction of the Court to the contrary be set down in the same manner as if it were a witness action assigned to such judge.

"(*d*) The petition shall be heard by the Court as a witness action and shall come on in due course in the witness list."

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[1913 S. 1515.]

Patent — Process — Licence to use and exercise Process — Condition requiring Licensee to purchase Article used in Process from Patentee—Article not protected by Patent—Defence to Action for Infringement—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *s.* 38.

The insertion in a licence to work a patented process of a condition requiring the licensee to purchase from the patentee an article not protected by the patent so far as it is required for use in the patented process is null and void under s. 38, sub-s. 1 (*b*), of the Patents and Designs Act, 1907.

The insertion by the patentee in a licence of such a condition is by s. 38, sub-s. 4, available to any person as a defence to an action for infringement of the patent.

So *held* by the Court of Appeal, affirming the decision of Warrington J.

TRIAL of questions of law.

The plaintiff was the owner of letters patent No. 23,676 of 1908. The specification of the patent was entitled "Process of increasing the keeping quality of compounds containing unstable oxygen," and proceeded to state that "compounds containing unstable oxygen, such as hydrogen peroxide" and other compounds, "liberate such oxygen very readily if they come in contact with catalytic agents." It then proceeded to state that the patentee had ascertained "that by the addition of pyrophosphates of the

alkalis (especially sodium pyrophosphates) the keeping quality of the above mentioned substances both in dry form and in solution can be considerably increased." The claim was: (1.) "The process of increasing the keeping quality of compounds containing unstable oxygen, such as hydrogen peroxide," and of certain other solutions "consisting in adding thereto alkali pyrophosphates, substantially as described. (2.) Dry mixtures of compounds containing unstable oxygen, such as sodium perborate or sodium percarbonate or sodium peroxide on the one hand, and alkali pyrophosphates on the other hand, substantially as described. (3.) The process of manufacturing the mixtures specified by crystallising the solutions of the said substances in common substantially as specified." The plaintiff brought this action against the defendant for infringement of the letters patent.

By his defence the defendant, besides denying the infringement, pleaded by paragraph 3, "The patentee has inserted into certain contracts made since the 1st day of January 1908 and in force at the date of the issue of the writ herein (particulars of which are given below) a condition that the respective licensees shall purchase all the pyrophosphates used by them in their hydrogen peroxide baths for the bleaching of straw-plait hats and all other fibre from the patentee's agents. The defendant relies on section 38 sub-section 4 of the Patents and Designs Act, 1907." (1)

(1) The Patents and Designs Act, 1907, s. 38:

"(1.) It shall not be lawful in any contract made after the passing of this Act in relation to the sale or lease of, or licence to use or work, any article or process protected by a patent to insert a condition the effect of which will be—

"(*a*) to prohibit or restrict the purchaser, lessee, or licensee from using any article or class of articles, whether patented or not, or any patented process, supplied or owned by any person other than the seller, lessor, or licensor or his nominees; or

"(*b*) to require the purchaser, lessee, or licensee to acquire from the seller, lessor, or licensor, or his nominees, any article or class of articles not protected by the patent;

and any such condition shall be null and void, as being in restraint of trade and contrary to public policy . . . .

"(4.) The insertion by the patentee in a contract, made after the passing of this Act, of any condition which by virtue of this section is null and void shall be available as a defence to an action for infringement of the patent, to which the

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The defendant added particulars of four contracts dated respectively March 18 and 29 and April 14 and 18, 1913, and respectively made between the plaintiff of the one part and certain licensees of the other part, whereby the plaintiff had granted licences for the use and exercise of the patented process during the whole period of the patent, reserving no royalties but containing a condition that the licensees should purchase all pyrophosphates used by them in their hydrogen peroxide baths for the bleaching of straw-plait hats and other fibres from the patentee's agents, at a stated price not exceeding a maximum of 6*d.* per lb.

The contracts in question were all in substantially the same form, of which the following is a specimen. By indenture dated April 14, 1913, made between the plaintiff (therein called the "patentee") of the one part and Henry Durler & Son of Luton, straw plait bleachers (therein called the "licensees"), of the other part, it was witnessed that "In consideration of the agreement on the part of the licensees hereinafter contained the patentee hereby grants unto the licensees licence and authority to use and exercise the process of increasing the keeping quality of oxygen which is part of the specification of the letters patent No. 23,676 of 1908 within the United Kingdom of Great Britain and Ireland for the term of the said patent. And it is hereby agreed as follows:

"1. The licensees shall during the continuance of this licence purchase all the pyrophosphates used by them in their hydrogen peroxide baths for the bleaching of straw-plait hats and all

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contract relates, brought while that contract is in force.

"(5.) Nothing in this section shall—

"(*a*) affect any condition in a contract whereby a person is prohibited from selling any goods other than those of a particular person; or

"(*b*) be construed as validating any contract which would, apart from this section, be invalid; or

"(*c*) affect any right of determining a contract or condition in a contract exerciseable independently of this section; or

"(*d*) affect any condition in a contract for the lease of or licence to use a patented article whereby the lessor or licensor reserves to himself or his nominees the right to supply such new parts of the patented article as may be required to put or keep it in repair."

other fibre from the patentee's agent, Herr Victor Wintsch of Zürich, Switzerland.

"2. The said pyrophosphates shall be supplied to the licensees by the said Victor Wintsch at prices to be fixed for the year in advance at the beginning of each year of the term for which this licence is granted. The price for the year to be fixed as aforesaid shall be regulated by the current market values of the raw materials composing the said pyrophosphates and shall be mutually agreed between the parties but in no case shall such price exceed the sum of sixpence per pound delivered free Luton.

"3. Should the licensees commit any breach of the above agreement, the patentee may by notice in wrriing determine this licence whereupon this licence shall forthwith cease and determine.

"4. If the patentee shall not within three months after his attention has been called to the matter take all such legal proceedings as may be necessary to prevent infringement of the said letters patent within the United Kingdom aforesaid, the licensees shall be relieved from all further obligations hereunder."

The action was set down to be tried on the questions of law raised by paragraph 3 of the defence, and was heard before Warrington J. on May 20, 1914.

Walter, K.C., and *J. Hunter Gray*, for the plaintiff. First, it was never intended by the Legislature to render null and void such a condition as that contained in these contracts. Such a condition, limited, as it is, to the pyrophosphates actually required for use in the patented process, is a reasonable and effective mode of remunerating the patentee and avoiding the necessity of reserving royalties and keeping accounts. Sect. 38, sub-s. 1 (*b*), must have a reasonable interpretation placed upon it. It contemplates in terms a "process protected by a patent" and the words "any article or class of articles not protected by the patent" should be read in the case of a process patent to mean also "any article or class of articles the use of which is not protected by the patent." The use of the pyrophosphates in the present case is protected by the patent. Sub-s. 5, clause (*d*), excepting the case of a condition whereby the patentee reserves

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to himself the right to supply new parts of a patented article, is not in terms applicable to a process patent like the present, but there is an analogy between the two cases which shews that the Legislature could not have intended to prohibit a similar condition as to the materials used in a process patent.

Secondly, if, contrary to our contention, the condition itself is null and void within s. 38, sub-s. 1, still the insertion of it in these contracts by the patentee is no defence to this action against the defendant under sub-s. 4. The intention of the Legislature in sub-s. 4 was to protect the licensee from the possible consequences which might follow from his repudiation of the void condition. It might be said that he was no longer a licensee and was therefore open to an action for infringement. The "purchaser, lessee or licensee," party to the contract, is the only person therefore who can raise this defence. The words are "available as a defence to an action," not to "any action."

Russell Clarke, for the defendant. The condition contained in these contracts is null and void under sub-s. 1. There is no reason for adding words to sub-s. 1 or for reading the language otherwise than according to its ordinary meaning. It is to the general interest that the patentee should not be allowed by means of such a contract to extend his monopoly to any articles not actually protected by the patent. The pyrophosphates referred to in clause 1 of the contracts are an ordinary article of commerce, and the use to which they are intended to be put does not alter the case. Clauses (*a*) and (*b*) of sub-s. 1 are alike founded on grounds of public policy and are not addressed merely to the relationship existing between the patentee and the licensee. The same consideration applies to sub-s. 4, in which the words "available as a defence to an action for infringement" mean an action against a third party as well as the licensee. It is a reasonable answer to the patentee bringing an action for infringement against a stranger for the latter to say that if he had applied for a licence he would have been subjected to a similar condition, and therefore there is good reason why he should be allowed to raise the condition, though contained in a contract made between the patentee and others, as a defence to the action against himself. The expression

occurs elsewhere in the Act, as for instance in ss. 25 and 26, where it clearly bears the general meaning of a defence to an action against whomsoever brought. Sub-s. 5, clause (*d*), is not applicable to the case. The exception created by that sub-section relating to the new parts of a patented article is a reasonable concession in the case of a patented article, but the absence of any similar exception in the case of a process patent relating to the materials used therein is strongly against the plaintiff's contention.

Walter, *K.C.*, in reply.

WARRINGTON J. This is an ordinary action for infringement of a patent. The defendant by his defence raises this point of law. In paragraph 3 he says, " The patentee has inserted into certain contracts made since the 1st day of January 1908 and in force at the date of the issue of the writ herein (particulars of which are given below) a condition that the respective licensees shall purchase all the pyrophosphates used by them in their hydrogen peroxide baths for the bleaching of straw-plait hats and all other fibre from the patentee's agents. The defendant relies on section 38 sub-section 4 of the Patents and Designs Act, 1907." Sect. 38, sub-s. 4, of that Act provides that the insertion by the patentee in certain contracts of a particular condition, which by the Act is declared to be null and void, shall be a defence to an action for infringement. The defendant says that the condition mentioned in paragraph 3 of his defence is such a condition as that referred to in sub-s. 4 ; that the contract in which it is inserted is one of the contracts also referred to in that sub-section ; and he says, that being so and this being an action for infringement brought while that contract is in force, the insertion of that condition is available to him as a defence to this action.

The question which I have to determine is, first, whether the condition in question is such a condition as is by virtue of the section null and void ; and secondly, if it is, then whether it is available as a defence to this action for infringement. It is necessary first to see what is the nature of the patent, otherwise it is impossible to understand either the contract which is relied upon by the

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defendant, or the effect of the Act of Parliament. [His Lordship read the specification as above set out and continued :] For the present purpose the important claim is the claim to the process of increasing the keeping quality of hydrogen peroxide by the addition to it of alkali pyrophosphates. Now that being the patent, on April 14, 1913,—I am taking one specimen of the contracts relied on in the defence—the patentee made this contract with the firm of Henry Durler & Son of Luton. [His Lordship referred to the contract above set out and continued :] I now turn to s. 38 of the Patents and Designs Act, 1907, to see how the condition which is thereby made null and void is described. Though the whole of sub-s. 1 does not apply I will read it in full for the moment. [His Lordship read sub-ss. 1, 4, and 5 and continued] I will now state the short effect of sub-s. 1, so far as it applies to the present case, because I think that it is otherwise impossible to understand or rather to apply it to the present case. So read it is as follows : " It shall not be lawful in any contract made after the passing of this Act, in relation to a licence to use any process protected by a patent, to insert a condition the effect of which will be to require the licensee to acquire from the licensor or his nominees any article or class of articles not protected by the patent."

It is said on behalf of the patentee that the pyrophosphates referred to in this agreement cannot properly be described as articles not protected by the patent. I will explain what is meant by that directly. When the agreement is looked at it is seen that the only thing which the licensees are required to purchase is "all the pyrophosphates used by them in their hydrogen peroxide baths," and the plaintiff contends that in substance the pyrophosphates which they are bound to acquire from the licensor are not pyrophosphates generally, but pyrophosphates answering the particular description of "used in their hydrogen peroxide baths," and that such pyrophosphates are protected by the patent, because they cannot use them in their hydrogen peroxide baths without infringing the patent. Can I put that construction on this section, or must I for the purposes of construction take the actual words of the section, and see from them what it is to which the section refers and which

the licensor must not require the licensees to purchase from him? The words are "to acquire from the seller, lessor or licensor, or his nominees, any article or class of articles not protected by the patent." It does not say "any article the use of which is not protected by the patent." It simply says "any article not protected by the patent." Let us see how that applies to the pyrophosphates. When a man goes to buy the pyrophosphates at the chemist's store, or wherever else it may be, he wants to buy alkali pyrophosphates, those which he proposes to use in this process. When he buys them they are certainly not protected by the patent. They are an ordinary article of commerce so far as the patent is concerned. Does it make any difference that the future use to which they may be put after he has bought them is protected by the patent? I do not think that it does. What the section says is that the patentee shall not require the licensee to acquire the article from him. There is nothing whatever said about the purpose for which the article when acquired is to be used. It simply says that the patentee shall not require the licensee to acquire the article from him if it is not protected by the patent, and it seems to me therefore that the condition is one which by s. 38 it is not lawful to insert in the particular kind of contract there referred to—in this case a contract for a licence to use the process. The view I take against the plaintiff's argument is strengthened by clause (*d*) of sub-s. 5, because the Legislature thought it right to insert a special protection in favour of the patentee in respect of a condition in the case of a patented article requiring the licensee to take new parts required for repairs from the patentee or the licensor. If it was thought necessary to insert that provision, it can, I think, only have been for the reason that, but for that provision, a condition requiring the licensee to take from the licensor a new part not protected by the patent, but yet which could not be used in connection with the machine without infringing the patent, would have been null and void. But the Legislature did not see fit to insert any such provision protecting the patentee from the consequences of inserting a condition requiring the licensee to take from the licensor materials for a process which in like manner, though themselves not protected, could not be used in a

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particular manner without infringing the process. It seems to me that that difference renders it still more incumbent upon the Court in construing this section to take the words as they stand and construe them in their natural meaning without resorting to some subtle means of ascertaining what may be presumed to have been the intention of the Legislature. I cannot speculate as to the intention of the Legislature. I must look at the words and see what they mean according to their ordinary interpretation, and so interpreted the purchase of these pyrophosphates from the licensor is in my opinion a purchase from the licensor of an article not protected by the patent, and the condition is accordingly one which is rendered null and void by s. 38.

The question then arises, what is the effect of my so deciding, and this question turns on the construction of sub-s. 4. I think that I must apply exactly the same method of construction to sub-s. 4 which I have already applied to sub-s. 1, that is to say, I must read the words according to their natural meaning. The condition referred to in sub-s. 4 is such a condition as is mentioned in sub-s. 1, that is, a condition contained in a contract between the patentee and a purchaser, lessee, or licensee, and sub-s. 4 provides that the insertion by the patentee in such a contract of such a condition "shall be available as a defence to an action for infringement of the patent, to which the contract relates, brought while the contract is in force." The contention on the part of the patentee is that the expression means "available as a defence to an action for infringement" against the purchaser, lessee, or licensee only, the suggestion being that, the condition being null and void, the licensee might refuse to comply with it, and it might then be said that, the contract being a complete contract, if he did not perform the condition he was no longer entitled to be treated as a licensee, and was therefore exposed to an action for infringement, and that the Legislature intended to meet the case by enacting that the insertion of the prohibited condition should be a good defence to an action for infringement. But here again there is nothing in the language to indicate that any such limitation is to be placed upon the enactment. The only

expressed limitation is that the action for infringement is to be one brought while the contract is in force, and to such an action the insertion of the condition is made available as a defence. A similar expression is used in other sections of the Act, where there can be no question that it means available as a defence to any action for infringement brought during particular periods. For example, s. 25, which provides for revocation of a patent by petition to the Court, enacts that every ground on which a patent might have been repealed or revoked as described in clauses (*a*) and (*b*) "shall be available by way of defence to an action for infringement." That must mean by way of defence to an action for infringement against whomsoever brought, whether against a person seeking to revoke the patent or not. So again by s. 26 power is given to the comptroller to revoke patents on certain grounds, and it is provided that "when an action for infringement or proceedings for the revocation of the patent are pending in any Court, an application under this section shall not be made except with the leave of the Court." The application may be made by anybody; the action for infringement may have been an action not necessarily against the person making the application to the comptroller, but against somebody else. There is no limit whatever to the generality of the expression "an action for infringement," and I cannot find any limit in sub-s. 4 of s. 38 any more than in the two other sections of the Act to which I have referred.

In my opinion, therefore, the defendant is entitled to succeed on both grounds, and the result is that the action fails.

A. C.

C. A.

From this decision the plaintiff appealed. The appeal was heard on July 8, 1914.

Walter, K.C., and *J. Hunter Gray*, for the appellant, repeated the arguments used by them in the Court below.

Russell Clarke and *Carrol Romer*, for the respondent, were not called upon.

Lord Cozens-Hardy M.R. This is an appeal from a decision of Warrington J. on a preliminary point of law raised in an action for infringement of a patent.

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The plaintiff is the patentee under a patent of 1908. The patent is, according to its title, for a "Process of increasing the keeping quality of compounds containing unstable oxygen." In substance, so far as I need refer to it, it is explained in the first claim in the specification, which is : [His Lordship read the first claim and continued :] There can be no doubt that the patent is a process patent. I do not refer to the other claims in the specification because we have nothing to do with them in this action. It is not a patent claiming alkali pyrophosphates; but it is one for a process for adding alkali pyrophosphates in a particular mode to certain solutions.

The plaintiff alleges in his action that the defendant has infringed his patent. The defendant on the other hand says that there is a preliminary question to be tried, and that the plaintiff is not in a position to maintain an action at all. He alleges that the plaintiff has been granting licences, to one of which it is sufficient for me to refer. [His Lordship referred to the terms of the grant of the licence and to clauses 1 and 2 of Durler & Son's contract and continued :]

I now turn to s. 38 of the Patents and Designs Act, 1907. That is a new provision obviously intended to deal with a practice with which the Courts were very familiar, under which the patentee was in the habit of only supplying the patented article on the terms of the purchaser buying something else from him. That was a practice which rightly or wrongly was thought to be objectionable, and Parliament has dealt with that matter in s. 38, sub-s. 1. [His Lordship read the sub-section and continued :] What does clause (*b*) of sub-s. 1 mean as applied to the earlier words in that sub-section ? It seems to me it means that if the patent is for a particular article as distinct from a process patent, the patentee must not require the purchaser to buy some other article from him in addition to the patented article. What does the sub-section mean as applied to a process patent? It is said that no sensible meaning can be given to it as applied to a process patent. I do not myself see the difficulty of applying it. Why cannot it mean that the patentee must not require a purchaser, as a condition of his using the process patent, to purchase from him some article

which is not protected by the patent? What is the meaning of the words "not protected by the patent"? I can attach no other meaning to those words than "not claimed by the patent." It seems to me to be a fallacy to argue, as Mr. Gray with great skill has argued, that there may be circumstances under which a process patent may protect the goods produced by working the process. That may no doubt be so in certain cases, if it can be proved that the process was used in producing the article complained of. That only arises in this way: that although the article itself is not protected by the patent because it may be made by other processes, yet if it can be shewn that it was produced by a particular patented process then damages can be recovered because the process has been used in its production.

The cases, and they were numerous in this Court, with reference to saccharin afford a good illustration of that. I refer to these cases because I tried some of them. There it was in evidence that saccharin could be produced by a number of different processes. The patentee said: "I tell you this saccharin is produced by my process patent X, or, if not, by my process patent Y." The answer was: "You cannot shew that; it may just as well have been produced by process patent Z, or A, B, C, or D or any number of them." It was therefore a fallacy to say in any of those cases that the saccharin was protected by the patent. The process was protected by the patent, and in so far as the particular process was used to produce the article, that article was evidence of infringement of the patent. But I see no reason to doubt that s. 38, sub-s. 1 (*b*), applies to a process patent as well as to an article patent, nor do I see any reason to doubt that the word "protected" means "claimed," because I cannot see any other meaning which can be attributed to it.

Then I come to sub-s. 4 of s. 38. [His Lordship read the sub-section and continued:] In the view which I take of sub-s. 1 of s. 38 it is quite clear that the condition imposed by this licence is null and void. It seems to me to be equally clear that under sub-s. 4 the insertion of that condition which is so made null and void is "available as a defence to an action for infringement of the patent to which the contract relates, brought while that contract is in force." It is impossible to limit that

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provision to an action brought against the licensee with whom the contract is made. The words are quite general, and I do not think that there has been any strenuous argument in support of the contention that sub-s. 4 should be limited to an action against the licensee himself.

In my opinion the view taken by Warrington J. on both points was perfectly right, and this appeal must be dismissed with costs.

SWINFEN EADY L.J. The first of the two questions arising on this appeal is whether there has been the insertion by the patentee in a contract made after the passing of the Patents and Designs Act, 1907, of any condition which by virtue of s. 38 of the Act is null and void.

The patent in question is a patent for a process, its object being, with regard to those compounds that contain unstable oxygen, to increase the keeping quality in such a manner that a better, that is to say a more economic, use of the oxygen at disposal may be effected. That object is attained by using certain alkali pyrophosphates. The patent is simply and solely a patent for a process. [His Lordship then read s. 38, sub-s. 1, and continued:] This is a licence granted by the patentee to work a process. [His Lordship referred to the terms of the grant of the licence in Durler & Son's contract and continued:] So that in terms it is a licence to use a patented process. What the patentee is forbidden to do is this. He is forbidden to insert a condition the effect of which will be under clause (*b*) of sub-s. 1 of s. 38 to require the licensee to acquire from the licensor any article not protected by the patent. This licence requires the licensees to purchase from the licensor, or his nominee, "all the pyrophosphates used by them in their hydrogen peroxide baths." The clause in the contract is: [His Lordship read clause 1 and continued:] The question then is: Are these pyrophosphates articles, or a class of articles, not protected by the patent? It is not suggested that they are not common articles of commerce that may be bought anywhere in the open market, and as such they are not in any way protected by the patent. The argument on behalf of the patentee is put in this way: the licensee is not bound to purchase all the pyrophosphates he

may require in his business, but only pyrophosphates of a particular description, namely, those which he may require to use in his hydrogen peroxide baths. It is not accurate, however, to say that they are pyrophosphates of any particular description. They are to be applied for a particular purpose, but there is no distinction between the alkali pyrophosphates that are bought for one purpose and those bought for another purpose; they are both of them common articles of commerce. Clause 1 of the contract does not relate, as was contended, to an article of a particular description which it is said is protected by the patent, but it relates to a common article of commerce which the licensee is intending to use for the purpose of the patented process. In my opinion such a common article of commerce is not protected by the patent. In order to be protected by the patent the article must be within the protection afforded by the patent: it must be properly described, specified, and claimed by the specification.

Therefore upon the first point I come to the conclusion that in this case the patentee, in a contract made after the passing of the Act of 1907, has inserted a condition which by virtue of s. 38 is null and void.

Then the second question is: Is the fact of the insertion of that condition in the contract available as a defence to an action for infringement of the patent brought by the patentee against a third person not a party to the contract? In my opinion it is. Such an action is an action for infringement of the patent, and it can hardly be seriously contended that sub-s. 4 of s. 38 was only intended to refer to actions brought, not against a third party infringing, but against the other party to the contract, who by the terms of the contract is licensed to use the patented process, and therefore, prima facie, could not be an infringer.

For these reasons I am of opinion that the judgment was right on both points, and that this appeal fails.

PICKFORD L.J. I am of the same opinion and I do not think it necessary to add anything.

Solicitors: *W. J. Hunter; Austin & Austin, for Austin & Barnard, Luton.*

W. I. C.

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[1913 T. 1645.]

Company—Directors—Fiduciary Position—Contract with another Company in which a Director holds Shares—Shares held as Trustee for Third Persons—Notice of Irregularity—Rescission.

Unless and so far only as authorized by a company's articles, the board cannot make a binding contract with any other company in which a member of the quorum holds shares.

This rule applies whether the shares are held in trust or beneficially.

If the second company has notice of the irregularity, the first company may obtain rescission of the transaction even after completion, provided that rescission is still possible.

So *held* by the Court of Appeal, affirming the decision of Astbury J.

Ex parte Bennett (1805) 10 Ves. 381; *Aberdeen Ry. Co.* v. *Blaikie* (1854) 1 Macq. 461; *Imperial Mercantile Credit Association* v. *Coleman* (1871) L. R. 6 Ch. 558; (1873) L. R. 6 H. L. 189; *North-West Transportation Co.* v. *Beatty* (1887) 12 App. Cas. 589; and *Costa Rica Ry. Co.* v. *Forwood* [1900] 1 Ch. 756; [1901] 1 Ch. 746, discussed and applied.

Witness Action.

This was an action to set aside two transactions between the plaintiff and defendant companies on the ground that the resolutions of the board of the plaintiff company by which they were authorized were invalid owing to the directors' interests therein.

The plaintiff company's articles provided (article 109) that two directors should form a quorum and (article 98) that "No contract or arrangement entered into on behalf of the company with any directors, or any firm of which a director is a member, shall be avoided, nor shall such directors be liable to account to the company for any profit realised by any contract or work, by reason of such directors holding that office or of the fiduciary relation thereby established, provided he discloses the nature of his interest; but no director shall vote in respect of any contract in which he is concerned."

In 1911 the directors of the plaintiff company were Young, Samuel, and Harvey. Samuel was also a director of the

defendant company. Young died in 1913, and Harvey died recently.

At a board meeting on February 1, 1911, Samuel suggested the purchase of shares in the Lydenberg (Transvaal) Gold Exploration Company with a view to securing control of the Lydenberg Company. It was decided to discuss the matter, also the question of amalgamation with the defendant company and the Lydenberg Company, at a special meeting on February 8, 1911.

At a special board meeting of February 8, 1911, at which Young, Samuel, and Harvey were present, Samuel submitted the desirability of acquiring shares of the Lydenberg Company with a view to securing, in conjunction with the defendant company, control of the Lydenberg Company, and it was decided to fall in with the suggestion. In view of the fact that the market in the Lydenberg shares was very restricted and that any bidding would unduly inflate the price, Samuel stated that he was empowered by the board of the defendant company, who held about 17,000 Lydenberg shares, to offer to sell to the plaintiff company a portion of their holding at 6*s.* per share, which offer was accepted to the extent of investing 1000*l.* Samuel "being a director of the" defendant company did not vote.

It was further resolved to endeavour to effect the sale of certain forfeited shares in the plaintiff company, and that Samuel be empowered to negotiate the sale of 20,410 forfeited shares on each of which 1*s.* was due (with a further liability of 4*s.* per share) at 5*s.* per share, at which price the shares would be issued as fully paid, or the shares could be issued as 16*s.* paid, on payment of the call of 1*s.* per share.

The above shares were 1*l.* shares with 15*s.* paid and had been forfeited for non-payment of a further 1*s.* call.

Samuel put the matter before the board of the defendant company and in the result it was arranged that the defendant company should take the shares with 16*s.* paid at 1*s.* per share.

At a board meeting of the plaintiff company held on March 29, 1911, at which Young, Samuel, and Harvey were present, a letter from the defendant company accepting the offer of 20,410 forfeited shares 16*s.* paid at 1*s.* per share made by Samuel on behalf

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of the plaintiff company was submitted. It was resolved that the 20,410 forfeited shares of the plaintiff company should be and they were thereby allotted to the defendant company. Samuel "being a director of" the defendant company "and interested in the purchase" did not vote.

The Lydenberg transaction was completed on February 23, 1911, and the purchase-money 999*l.* 18*s.* paid by the plaintiff company.

The forfeited shares were allotted to the defendant company on March 29, 1911, and a certificate issued. The defendant company paid the purchase price 1020*l.* 10*s.* (i.e., 1*s.* a share) on July 24, 1912, and on October 15, 1912, they paid another 1020*l.* 10*s.* in respect of a call of 1*s.* a share made on February 7, 1912.

The plaintiff company subsequently discovered that at the date of both the above transactions Samuel, who was acting as agent for the defendant company, held 11,062 shares in the defendant company, being about 5 per cent. of their capital. There was a conflict of evidence as to whether Samuel disclosed the nature or amount of this interest to the plaintiff company's board, and the Court held that if the onus lay on the defendant company to prove disclosure that onus had not been discharged.

The plaintiff company also discovered that at the date of both transactions Harvey held 1000 shares in the defendant company. Harvey in fact held 1000 shares in the defendant company as trustee in the following circumstances. The shares were put into his name by his father-in-law Thompson so that he might look after Thompson's interest and have a chance of obtaining a directorship. The shares remained in his name after Thompson's death in 1904, the calls being paid by Thompson's executors, and at the dates of the impeached resolutions Harvey's wife as one of the residuary legatees under Thompson's will had a vested reversionary interest in the shares subject to the life interest of her mother, who died in November, 1912.

Harvey had voted for the resolutions without disclosing his shareholding in the defendant company, and also without disclosing the fact that two days before the second resolution he had been appointed a director of the defendant company by

Samuel and another director, which appointment he was about to accept, and did in fact accept three days later.

The other director, Young, who voted for the resolutions, had no interest in the defendant company.

In these circumstances the plaintiff company brought this action on November 13, 1913, to rescind both transactions on the ground that the resolutions were invalid. The plaintiff company still held the Lydenberg shares, and the defendant company still held the reissued forfeited shares, so that there was no difficulty about rescission and restitutio in integrum.

The defendant company did not admit the invalidity of the resolutions or that they had notice of any irregularity. A plea of laches was withdrawn on the evidence. At the hearing the defendant company raised a further point that with regard to the second transaction there was a concluded contract independent of the resolution of March 29, 1911. The present decision was given without prejudice to this point, upon which, as it was not pleaded, the Court declined to express any concluded opinion.

The action came on for hearing before Astbury J. on April 3, 1914.

Gore-Browne, K.C., and *Maurice Beachcroft*, for the plaintiff company. Apart from some special provision in the articles a director cannot bind the company by a contract in which he is personally interested: *North-West Transportation Co.* v. *Beatty*. (1) Nor can he retain any benefit under such a contract: *Imperial Mercantile Credit Association* v. *Coleman*. (2) The reason of this general equitable rule is that the company have a right to the services and advice of every director: *Benson* v. *Heathorn* (3); *Aberdeen Ry. Co.* v. *Blaikie* (4); Buckley on Companies, 9th ed. p. 640.

Under the general law therefore these transactions could not stand, as both Samuel and Harvey were interested as shareholders in the defendant company. The fact that Harvey only held his shares as trustee makes no difference. There was a

(1) 12 App. Cas. 589, 593.
(2) L. R. 6 Ch. 558, 566; L. R. 6 H. L. 189, 198.
(3) (1842) 1 Y. & C. Ch. 326, 341.
(4) 1 Macq. 461, 471.

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clear conflict between his duty as director of the plaintiff company and his duty to his cestuis que trust. Disclosure of interest would not remove this objection under the general law.

The defendant company rely on article 98. But that article only applies to a contract made with a director or his firm. In such a case the contract is valid if the director discloses his interest and abstains from voting. A contract made with a company in which a director holds shares is outside article 98 and is governed by the general law.

Even if the transactions fell within article 98, its terms were not complied with. There was no sufficient disclosure of Samuel's interest, and Harvey voted without any disclosure at all. In these circumstances there was no proper quorum and the resolutions were wholly invalid: *In re Greymouth Point Elizabeth Ry. and Coal Co.* (1)

Hon. Frank Russell, K.C., and *Ashton Cross*, for the defendant company. There was a sufficient quorum without Samuel, who though present did not vote on either resolution, and the case really depends on Harvey's position. It is suggested that by the general law a board of directors cannot make a contract with any company in which a member of the quorum holds shares. There is no authority for such a proposition. If it were sound, many boards would be unable to make beneficial contracts with the great railway companies. In the present case Harvey was not even a beneficial shareholder in the defendant company. He was merely a trustee for Thompson's executors.

[ASTBURY J. His wife was interested in Thompson's residue.]

Treat him as a trustee for his wife. It was not his duty to her to see that his directors sold property at the best price, or bought at a reasonable price. That was the duty of the defendant company's board of which he was not yet a member.

The contrary view would cast a very heavy burden on trustee shareholders and cannot be the law. There is no direct authority on the point, but in *Dimes* v. *Grand Junction Canal Proprietors* (2) it was mentioned in the argument. Sir Fitzroy Kelly, S.-G., was contending that as the Lord Chancellor held ninety-two shares in the company, partly in his own right and partly as trustee, he

(1) [1904] 1 Ch. 32. (2) (1852) 3 H. L. C. 759, 770.

was disqualified from hearing the cause. Lord Brougham asked, "Suppose he had been a trustee alone?" Sir Fitzroy Kelly replied, "As such he would not have had any interest whatever."

In the present case the directors' fiduciary duties in respect of contracts are completely defined by article 98, and the supposed general rule if it exists is thereby abrogated: *Imperial Mercantile Credit Association* v. *Coleman* (1); *Costa Rica Ry. Co.* v. *Forwood.* (2) The only obligations imposed by article 98 are (*a*) that in the case of contracts by the company with a director or his firm the director must disclose his interest, and (*b*) a director must not vote in respect of any contract in which he is concerned. These obligations do not apply to Harvey. In the first place he was not contracting with the plaintiff company, and was therefore under no obligation to disclose his interest, even if he had one. Secondly, even if indirectly interested he was not "concerned" n the contract so as to be precluded from voting: *Todd* v. *Robinson* (3); *Morris* v. *Howden.* (4)

Even if the directors were wrong the defendant company had no notice of any irregularity, and there is no ground for rescinding completed transactions.

[Astbury J. Samuel was the defendant company's agent in both transactions.]

He was agent for sale in the first transaction, agent for purchase in the second. It was not his duty as such to inform the defendant company of any irregularity in the resolutions of the plaintiff company's board. The plaintiff company's proper remedy, if any, was to make their delinquent directors account for profits. That was the remedy discussed and dealt with in the cases they rely on.

Gore-Browne, K.C., in reply. Sir Fitzroy Kelly's admission in *Dimes* v. *Grand Junction Canal Proprietors* (5) was unsound. The decision did not in any way depend upon it, as the Lord Chancellor also held shares in his own right. It is quite as important to avoid a conflict of duties as a conflict of interests, e.g., a trustee

(1) L. R. 6 Ch. 558, 570.
(2) [1900] 1 Ch. 756, 765; [1901] 1 Ch. 746, 766.
(3) (1884) 14 Q. B. D. 739, 745
(4) [1897] 1 Q. B. 378, 383.
(5) 3 H. L. C. 759, 770.

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cannot purchase either for himself or as agent for another: *Ex parte Bennett.* (1)

[ASTBURY J. Is there any reported decision in which a transaction between two companies has been set aside because a director in one company was a trustee shareholder or even a beneficial shareholder in the other ?]

There is no direct authority, as in most cases it is too late for rescission, and the first company has to be content with an account of profits. But the cases recognize that there would have been a right to rescission if matters had not been altered since the transaction: *In re Lady Forrest (Murchison) Gold Mine* (2); *Lagunas Nitrate Co.* v. *Lagunas Syndicate.* (3) It is a fallacy to say that the general law is abrogated by article 98. It is merely relaxed in the specific instances and on the special conditions mentioned. The defendant company had notice of the irregularities through their agent Samuel, who knew of them in his capacity as director of the plaintiff company.

ASTBURY J. (after stating the facts). The question is whether the transactions effected by these resolutions can stand. On the pleadings there are three matters only that I am entitled to take into consideration. One is that at the dates of both these meetings, and in respect of the transactions which took place at both, Samuel was present in his capacity as agent for the defendant company. In the second place, at the date of both of these meetings Harvey was a holder in trust for his wife and others of the shares which he held in the defendant company, and thirdly at the date of the second meeting Harvey knew that he had been elected a director of the defendant company, and certainly had no intention, as far as I can judge, of doing otherwise than accepting that position.

Now in ordinary cases "a director of a company is precluded from dealing, on behalf of the company, with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect; and this

(1) 10 Ves. 381, 400. (2) [1901] 1 Ch. 582, 590.
(3) [1899] 2 Ch. 392.

rule is as applicable to the case of one of several directors as to a managing or sole director." That I take from the judgment of Sir Richard Baggallay in *North-West Transportation Co.* v. *Beatty* (1), which is a statement of the general rule of this Court.

In *Imperial Mercantile Credit Association* v. *Coleman* (2), in the Court of Appeal, Lord Hatherley L.C. stated the general principle "that a person holding a fiduciary position with regard to a company cannot obtain for himself a benefit derived from the employment of the funds of the company in any matter in which he, the director, may happen to be engaged. The principle is so firmly established that I should be extremely sorry to say anything which would in the slightest degree impeach it; but the application of the principle is not always so easy in the various complicated arrangements which take place with regard to mercantile transactions," and he cites (3) Knight Bruce V.-C.'s judgment in *Benson* v. *Heathorn* (4), "that the company have a right to the services of their directors, whom they remunerate by considerable payments; they have a right to their entire services, they have a right to the voice of every director, and to the advice of every director in giving his opinion upon matters which are brought before the board for consideration; and that the general rule that no trustee can derive any benefit from dealing with those funds of which he is a trustee applies with still greater force to the state of things in which the interest of the trustee deprives the company of the benefit of his advice and assistance." There is a further part of that case which I propose to deal with presently.

The House of Lords, though reversing this decision on the facts, laid down the same principles, Lord Chelmsford saying (5): "'The principle,' as the Lord Chancellor said in his judgment in this case, 'is firmly and well established, that a person holding a fiduciary position with regard to a company cannot obtain for himself a benefit derived from the employment of the funds of the company in any matter in which he, the director, as such

(1) 12 App. Cas. 589, 593.
(2) L. R. 6 Ch. 558, 566.
(3) L. R. 6 Ch. 567.
(4) 1 Y. & C. Ch. 326.
(5) L. R. 6 H. L. 189, 198.

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director, may happen to be engaged.'" Then he says (1): "For surely when the directors are to determine whether they will enter into any contract, or order any work to be done for the company in which a brother director is interested, it may be a most important element in their consideration what the nature of the interest is which is required to be declared," and the other Lords stated the same proposition.

I think I may take the rule generally as summed up in *Aberdeen Ry. Co.* v. *Blaikie* (2) as follows: "A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the interest of the cestui que trust, which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person,—they may even at the time have been better. But still so inflexible is the rule that no inquiry on that subject is permitted."

Now as a matter of fact in these cases the remedy which the Court has given to the parties complaining of the transactions impeached has apparently taken the form of depriving the director interested in the transaction of all profits made by him thereby; and it has been contended before me that the mere fact that Harvey was interested as a shareholder in the defendant company, and especially having regard to the fact that that

(1) L. R. 6 H. L. 200. (2) 1 Macq. 461, 471.

interest was an interest as a trustee and not on his own behalf, is not such an interest as ought, especially having regard to article 98, to render these resolutions invalid.

That involves two matters for consideration. In the first place, having regard to the principles laid down by Lord Eldon in *Ex parte Bennett* (1), unless such a transaction is authorized by the articles, a resolution of directors to deal with another company in which one of the directors forming the quorum to the resolution was interested as a shareholder is and ought to be sufficient to invalidate the transaction.

I have been asked to say that the fact of Harvey being a mere trustee of these shares ought to make a difference, and I have been referred to an admission in the argument of Sir Fitzroy Kelly in *Dimes* v. *Grand Junction Canal Proprietors* (2), there apparently being, I am told, no direct decision on this point. Now, giving all the weight that I ought to give to the admission of that learned counsel, I cannot see on principle why, if a man is interested as a trustee to do the best he can for his cestui que trust instead of doing the best he can for himself if he were interested personally, that ought to make any difference in principle as to that duty being in conflict with the duty which he owes to the company of which he is a director in such a transaction as the present. In the present case it was Harvey's duty to make the best bargain he could for the plaintiff company in relation to these Lydenberg shares. It was his duty as trustee of the shares in the defendant company to make the best bargain he could for his cestui que trust in connection with that holding. That conflict seems to me to fall within the danger referred to by Lord Eldon in *Ex parte Bennett* (1), and apart from the question of article 98 I see no reason why I should whittle down any such wholesome principle.

It is contended, however, secondly that, whether that be right or not, this company has by article 98 contracted itself out of the common law principle, and that directors may contract on behalf of this company with themselves or with a firm in which they are partners, and that no such contract shall be avoided by reason

(1) 10 Ves. 381. (2) 3 H. L. C. 770.

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of their fiduciary relation, provided that the director discloses the nature of his interest and does not vote in respect of any contract in which he is concerned.

Now the article in terms does not refer at all to shareholding in another company, but it has been contended that the greater must include the less, and that, if this company intended to exclude the wholesome common law rule with regard to contracts made directly with directors or with firms in which they happen to be partners, a fortiori it must have been intended to exclude contracts made with companies in which the directors were merely shareholders, and for that proposition another portion of the judgment of Lord Hatherley in *Imperial Mercantile Credit Association* v. *Coleman* (1) has been referred to, which was acted upon by Byrne J. in *Costa Rica Ry. Co.* v. *Forwood.* (2)

Now, as I understand that portion of those two decisions they come to this: it is not necessary to have a direct article that contracts of this character shall be permissible. In *Imperial Mercantile Credit Association* v. *Coleman* (1) and in *Costa Rica Ry. Co.* v. *Forwood* (2) there was only an article providing as to the vacation of the office of a director in the event of his making such a contract with the company without declaring his interest, and the learned judges who dealt with those cases held that these contracts were by implication allowed to exist subject to the penalty of the vacation of office in the event of non-disclosure as provided. But I do not myself find in either of those authorities any justification for the proposition that, if the common law rule is excluded with regard to a certain class of contract provided the director discloses his interest and does not vote, another and perhaps less vicious character of contract shall also be excluded in a case where the director does not disclose his interest and does vote. I think myself that in this particular case there is no sufficient justification for saying that this is a company in which a director who is a shareholder in another contracting company may take part in passing a resolution in the way that Harvey has done; and for this reason, coupled with the fact that the Lydenberg transaction was introduced to this company by Samuel as agent

(1) L. R. 6 Ch. 558, 568, 570. (2) [1900] 1 Ch. 756.

for the defendant company, that transaction ought not to stand.

Everything that I have said with regard to Harvey's shareholding in the defendant company equally applies to the second transaction. But there is also in addition the difficulty, if difficulty it be, of Harvey having been appointed two days prior to the second resolution a director of the defendant company, which, although such directorship was not completed by his acceptance, he, in my judgment, on the evidence before me, had obviously no intention of doing otherwise than accepting. The second resolution I think is further vitiated by that fact, and the question of Samuel's agency for the defendant company in respect of that transaction is also an important matter to be taken into consideration. [After declining to express any concluded opinion as to whether there was any contract as to the second transaction on which independently of the resolution the defendant company could rely, his Lordship continued:]

The next point was that both these matters have been completed. In the first case the shares have been handed over by the defendant company to the plaintiff company, and the money paid; and in the second case the forfeited shares have been re-allotted to the defendant company; and it has been contended that the defendant company completed the transactions without notice of any irregularity. Now I do not think that that plea is open to the defendant company. It is admitted here, and it must be taken as admitted for the purposes of this case, that with regard to both and in respect of both these transactions Samuel was the agent of the defendant company. He was a director of the plaintiff company and knew everything that was going on as agent of the defendant company. He was their servant or agent for the purpose of dealing with and entering into these transactions, and as such capable of receiving notice, and I think that the plea is unavailing to the defendant company.

The third point which was originally relied upon, and has practically been given up this morning, is that there has been too long a delay in commencing this action on behalf of the plaintiff company. That point is no longer pressed and I do not propose to deal with it.

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[His Lordship then made an order rescinding both transactions without prejudice to the right of the defendant company to set up an independent contract as to the second transaction if so advised.]

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Against this decision the defendant company appealed. The appeal was heard on July 24, 1914.

Hon. Frank Russell, K.C., and *Ashton Cross*, for the appellants, and

Gore-Browne, K.C., and *Maurice Beachcroft*, for the respondents, repeated the arguments relied upon in the Court below and cited the following additional authority: *King, Viall & Benson* v. *Howell.* (1)

Cur. adv. vult.

July 31. SWINFEN EADY L.J. read the judgment of the COURT (Lord Cozens-Hardy M.R., Swinfen Eady L.J., and Pickford L.J.). The first question raised by this appeal is whether the purchase by the plaintiffs from the defendants of a block of 3333 ordinary shares of the Lydenberg (Transvaal) Gold Exploration Company, Limited, for 999*l.* 18*s.* was voidable at the plaintiffs' option.

On February 1, 1911, there was a board meeting of the plaintiff company at which there were present Sir F. Young, in the chair (an old gentleman upwards of ninety and since deceased), Mr. James William Harvey, since deceased, and Henry Samuel. At this board meeting a suggestion was made by Samuel that the company should buy shares in the Lydenberg Company, and the matter was adjourned to a special board meeting on February 8. Harvey appears to have known very little if anything about this company, as the next day he wrote to Crake, the secretary of the company, asking for particulars about it, and referring to Samuel's proposal that the company should purchase 1000*l.* worth of shares. Crake in reply sent certain particulars taken from the Stock Exchange Official Intelligence, from which it appeared that the company was registered in October, 1894, but had never yet paid any dividend. On

(1) (1910) 27 Times L. R. 114

February 6 Harvey wrote again to Crake, the secretary, saying that he did not understand why Samuel proposed the purchase of the Lydenberg shares. It afterwards, however, transpired that Samuel was pecuniarily interested in the transaction, and that one half of the shares which he proposed that the plaintiff company should purchase belonged to himself.

On February 8 the board meeting was held at which the purchase was resolved upon. Sir F. Young was in the chair, and there were also present Messrs. Harvey and Samuel. [His Lordship read the minute of what took place at the meeting and continued:]

At this time the plaintiffs' cash resources were small, and they had to mortgage their uncalled capital to their bankers to raise the 1000*l.* required to pay for these Lydenberg shares.

It appears from the evidence that Samuel did not disclose on February 8 that he had any interest in the proposed purchase. He merely abstained from voting, on the ground that he was a director of the selling company, and the two directors forming the quorum who voted were Sir F. Young and Harvey. Harvey, however, held 1000 shares in the selling company, and was thus also interested in the sale of the shares, which as confidential agent of the plaintiff company he was instrumental in buying for them.

We should mention that Harvey held the 1000 shares of the defendant company as trustee under his father-in-law's will, and that Harvey's wife was beneficially interested in one tenth of the shares, subject to her mother's life interest therein.

The question thus arises, can a director of a company, on behalf of the company, buy shares or other property from himself, or from a company in which he is pecuniarily interested?

In our opinion, it is not material whether the interest which Harvey had in the 1000 shares was as trustee, or whether the shares belonged to him beneficially. As trustee it was his duty to do his best and make the most of the trust estate for his cestuis que trust, and as beneficiary his interest was to do the best he could for himself; but in either case his duty or interest, as the case might be, would conflict with the duty which he owed to the company of which he was director.

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The law was thus stated by Sir Richard Baggallay, in the Privy Council, in *North-West Transportation Co.* v. *Beatty* (1): "A director of a company is precluded from dealing, on behalf of the company, with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect; and this rule is as applicable to the case of one of several directors as to a managing or sole director."

This was in substance the language of Lord Cranworth in the House of Lords in *Aberdeen Ry. Co.* v. *Blaikie.* (2) It was there decided that directors of a company have duties to discharge of a fiduciary nature towards their principal, and that it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect: and that so strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It was accordingly held that a director of a railway company was precluded from dealing on behalf of the company with himself, or with a firm of which he is a partner, and that it makes no difference whether the contract relates to real estate, or personalty, or mercantile transactions, the disability arising, not from the subject-matter of the contract, but from the fiduciary character of the contracting party. This was a Scottish case, but it was held that there was no difference between the law of Scotland and the law of England in this respect, both coming from the Roman law; and that the doctrine rested on such obvious principles of good sense that it was difficult to suppose that there could be any system of law in which it would not be found. It was further contended in that case that, whatever might be the general principle applicable to contracts of that nature, the Legislature had in the case of corporate companies, like the railway company, modified the rule by the Companies Clauses Act, ss. 88 and 89 of the Scottish statute being the same as ss. 85 and 86 of the English

(1) 12 App. Cas. 589, 593. (2) 1 Macq. 461.

Companies Clauses Act, but Lord Cranworth pointed out that those sections merely vacated the office of a director, and did not validate a contract otherwise invalid; he added that the decision of the Common Pleas in *Foster* v. *Oxford, Worcester and Wolverhampton Ry. Co.* (1) merely decided that a contract good at law was not affected at law by an enactment that its effect should be to deprive one of the contracting parties of an office, but that the decision would not help the respondents—Messrs. Blaikie—unless they could go farther and shew that the statute had had the effect of making valid a contract which was bad on general principles—that is to say, principles enforceable only in equity, but not then recognized by Courts of common law. He added that he could discover no ground whatever for attributing to the statute any such effect; but that its provisions would still be applicable to the case of directors who became interested in contracts as representatives or otherwise and not by virtue of contracts made by themselves.

Where a director of a company has an interest as shareholder in another company or is in a fiduciary position towards and owes a duty to another company which is proposing to enter into engagements with the company of which he is a director, he is in our opinion within this rule. He has a personal interest within this rule or owes a duty which conflicts with his duty to the company of which he is a director. It is immaterial whether this conflicting interest belongs to him beneficially or as trustee for others. He is bound to do as well for his cestuis que trust as he would do for himself. Again the validity or invalidity of a transaction cannot depend upon the extent of the adverse interest of the fiduciary agent any more than upon how far in any particular case the terms of a contract have been the best obtainable for the interest of the cestui que trust, upon which subject no inquiry is permitted.

The case of *Todd* v. *Robinson* (2) is an instance of a very small interest as shareholder of a company being held to make a person "interested" in a contract.

By s. 193 of the Public Health Act, 1875, it is enacted that officers or servants employed under the Act by a local authority

(1) (1853) 13 C. B. 200. (2) 14 Q. B. D. 739.

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shall not in any wise be concerned or interested in any bargain or contract made with such authority for any of the purposes of the Act, under a penalty of 50*l*. The defendant was clerk to the local board at a time when a contract was made with the local gas company, in which he was a shareholder, increasing the price for street lamps from 45*s*. to 46*s*. per lamp; the benefit accruing to the defendant as shareholder from the contract for the supply of gas was merely nominal, but he was held liable for the penalty by the Court of Appeal.

It is in consequence of the general law being as we have stated that from time to time provision is made by statute, or by the articles of association or other instruments regulating the organization, management, and control of particular companies, modifying what would otherwise be the rule applicable.

Thus with regard to statutory companies, the Companies Clauses Act, 1845, s. 87, provides that a director of a statutory company being a member of a joint stock company shall not thereby be disqualified from acting as such director, but he shall not vote on any question as to any contract with the joint stock company.

So clause 77 of Table A of the Companies (Consolidation) Act of 1908 provides that the office of a director shall be vacated if he is concerned or participates in the profits of any contract with the company, with a proviso that no director shall vacate his office by reason only of being a member of a contracting company, but he is not to vote in respect of any such contract, and if he does so vote, his vote is not to be counted.

The case of *Costa Rica Ry. Co.* v. *Forwood* (1) shews the extent to which a director may be protected by articles of this kind, but the same case emphasized the general rule. Vaughan Williams L.J. referred to the stringency of the rule which does not allow directors, trustees, agents, or others standing in a fiduciary relation to enter into engagements conflicting, or which may possibly conflict, with the interest of those whom they are bound to protect. See also *Benson* v. *Heathorn* (2) and *Imperial Mercantile Credit Association* v. *Coleman*. (3)

(1) [1900] 1 Ch. 756, and on appeal [1901] 1 Ch. 746, 760.

(2) 1 Y. & C. Ch. 326.

(3) L. R. 6 Ch. 558, 567.

With regard to the plaintiff company, this matter is regulated by article 98.

This is the only provision in the plaintiff company's articles modifying what would otherwise be the rule of law applicable, and enabling a director of the plaintiff company to be interested as a member of a company with which the plaintiff company is contracting ; but it requires that the director shall disclose the nature of his interest, and shall not vote in respect of any contract in which he is concerned.

The provisions of this article were not observed when the resolution to purchase the Lydenberg shares was carried, as Harvey voted in favour of it, and without his vote being counted there was no quorum, whereof the defendants, the other contracting party, had full notice. The result is that the contract was voidable, and has been duly avoided, and the plaintiffs are accordingly entitled to have the purchase-money repaid, but they must return the Lydenberg shares.

It was not disputed by the appellants that if the first transaction in Lydenberg shares is voidable, by reason of Harvey's vote having carried it, the second transaction in the partly paid shares of the plaintiff company stands in no better position and is voidable also, and the like result must follow. In our opinion the judgment appealed from was right, and the appeal fails and should be dismissed.

Solicitors : *Herbert Reeves & Co.; Thompsons, Quarrell & Jones.*

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[1913 C. 2951.]

Company—Directors—Casual Vacancy—Election by Sole Remaining Director—Qualification—Appointment of Unqualified Persons—Irregular Allotment—Validation of Irregular Acts—Companies Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 16), *ss.* 14—17, 81, 85, 89, 90, 92, 99.

The defendant company was incorporated by an Order, confirmed by the Board of Trade, under the Light Railways Act, 1896. This Order incorporated the provisions of the Companies Clauses Consolidation Act, 1845, and provided, inter alia, that the number of directors should be five, but that the company might vary the number if it was not less than three nor more than seven; that the qualification of a director should be not less than 250*l.* in the share capital; that the quorum at a directors' meeting should be three, but that if the number was reduced to three the quorum should be two; and that P., J., and C., and two other persons nominated by them, should be the first directors. P., J., and C. never nominated any other directors, but allotted to each of themselves his qualifying shares, and one share each to four other persons. At the first ordinary meeting the number of directors was reduced to three, and P., J., and C. were continued in office. P. and C. afterwards transferred their qualification shares to the plaintiff company, and thereby ceased to be directors. J. subsequently appointed X. and Y. to be directors. At the time of their appointment neither of them held the necessary qualification shares, but at the same meeting J., X., and Y. (acting in the bona fide belief that the appointment of X. and Y., subject to their at once acquiring their qualification shares, was good) purported to allot such shares to them. In an action by the plaintiff company against the railway company and J., X., and Y.:—

Held by the Court of Appeal, affirming the decision of Sargant J. [1914] 1 Ch. 568, that although the power to elect directors in the case of casual vacancies was by s. 89 of the Act of 1845 given to "the remaining directors," it was unnecessary to the exercise of that power that there should be in office the number of directors prescribed by the Order, and therefore that J. had power to elect new directors; that the holding of the required qualification shares was a condition precedent to the election of a director, and therefore that X. and Y. had not been duly appointed and could not act as directors; but that the irregular allotment by J., X., and Y. of the qualification shares to X. and Y. was an act done by de facto directors, which was validated by s. 99 of the same Act, the test being whether the directors in making the allotment had acted bona fide, which was not disputed in this case.

Provisions like s. 99 are to be construed broadly as between

companies and their members as well as between companies and outsiders.

Dawson v. *African Consolidated Land and Trading Co.* [1898] 1 Ch. 6 and *British Asbestos Co.* v. *Boyd* [1903] 2 Ch. 439 followed.

In re Staffordshire Gas and Coke Co. (1892) 66 L. T. 413 overruled.

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APPEAL from a decision of Sargant J. (1)

The defendant company was incorporated by an Order confirmed by the Board of Trade in 1909 under the Light Railways Act, 1896 (59 & 60 Vict. c. 48). This Order incorporated the provisions of the Companies Clauses Act, 1845, and provided, inter alia, that the number of the directors of the company should be five, but that the company might vary that number so that it was not less than three nor more than seven; that the qualification of a director should be the possession in his own right of not less than 250*l.* in the share capital of the company; that the quorum at a directors' meeting should be three, but if the number of directors was reduced to three the quorum was to be two; and that the first directors should be Sir Weetman Dickinson Pearson (afterwards created Lord Cowdray), Sir John Jackson, Sir William Henry Crundall, and two other persons to be nominated by them. The capital of the company was to be 60,000*l.* in 6000 shares of 10*l.* each.

On July 20, 1910, the three original directors allotted to each of themselves twenty-five shares in the company, and to four other persons one share each. The same three original directors never nominated any other directors under the provisions of the Order, and at a general meeting held on July 20, 1910, the following resolution was passed:—"That the number of directors be reduced to three, and that the three following directors continue in office: The Right Hon. Lord Cowdray (referred to in the Order as Sir Weetman Dickinson Pearson), Sir John Jackson, M.P., and Sir William Henry Crundall." There were present at this general meeting the three original directors and two out of the four other shareholders. The three original directors continued in office until April 21, 1913, when Lord Cowdray and Sir W. H. Crundall transferred their shares to the plaintiff company, which was registered as the holder of the fifty

(1) [1914] 1 Ch. 568.

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shares so transferred. The transferors thus ceased to be directors.

On July 29, 1913, Sir John Jackson, the sole remaining director, purported to fill up the vacancies on the board by appointing John Proffitt and Arthur Jackson to be directors of the defendant company. Proffitt was then the holder of one share, but subsequently at the same meeting Sir John Jackson, Proffitt, and A. Jackson purported to allot twenty-four shares to Proffitt and twenty-five shares to A. Jackson. This was done in the bona fide belief that an appointment of directors subject to their at once acquiring their qualification shares was good.

On August 26, 1913, the plaintiff company transferred twenty-five of their fifty shares in the defendant company to R. T. Smith and the other twenty-five to E. O. Brown, but at the date of the motion below referred to these transfers had not been registered.

In an action by the Channel Collieries Trust, and Smith and Brown (suing on behalf of all the shareholders in the defendant company except Sir John Jackson), against the defendant company, Sir John Jackson, Proffitt, and A. Jackson, the plaintiffs moved for an injunction to restrain Proffitt and A. Jackson from acting as directors or shareholders in respect of the shares purported to have been allotted to them; an order rectifying the register of shareholders (*a*) by removing therefrom the names of Proffitt and A. Jackson and (*b*) by entering therein the names of Smith and Brown; an injunction to restrain Sir J. Jackson, as the sole director, from purporting to act as a board of directors of the defendant company except for the purpose of filling up vacancies on the board; an order on Sir J. Jackson to fill up the vacancies on the board by appointing Smith and Brown as directors; and an order on Sir J. Jackson to convene a meeting of the shareholders of the defendant company to regularize its constitution and proceedings.

Upon the hearing of the motion Sargant J., after deciding a question as to the validity of the resolution passed at the general meeting on July 20, 1910, whereby the number of directors was reduced to three (as to which there was no appeal), held (1.) that although the power to elect directors in the case of casual

vacancies was, by s. 89 of the Act of 1845, given to "the remaining directors," it was unnecessary, for the exercise of the power, that there should be in office the number of directors prescribed by the Order, and, therefore, that Sir J. Jackson had power to elect new directors; (2.) that by s. 85 of the Act of 1845 the holding of the required qualification shares was a condition precedent to the election of a director, and, therefore, that Proffitt and A. Jackson had not been duly appointed and could not act as directors; (3.) that the irregular allotment of the shares to Proffitt and A. Jackson was validated by s. 99 of the Act of 1845; (4.) that Smith and Brown were entitled to have the register of shareholders rectified by inserting their names as holders of the shares transferred to them; and (5.) that Sir J. Jackson must be ordered to convene a general meeting at an early convenient date.

Against this decision the plaintiffs appealed. The only points argued upon the appeal were whether Sir J. Jackson as sole remaining director had power to elect Proffitt and A. Jackson as directors, and, assuming that he had power to do so, whether the holding of the required qualification was a condition precedent to their election as directors, and further whether the allotment to Proffitt and A. Jackson of their qualification shares was a good allotment having regard to s. 99 of the Act of 1845, which provides that "all acts done by any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall, notwithstanding it may be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were or was disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director."

Romer, K.C., and *Roope Reeve*, for the appellants, repeated the arguments urged by them in the Court below in support of their contention upon the above mentioned points, and cited in addition the following cases: *In re Alma Spinning Co.* (1) and *In re Allison & Co.* (2)

(1) (1880) 16 Ch. D. 681. (2) [1904] 2 K. B. 327.

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Martelli, K.C., and *H. S. Preston*, for the respondents, were not called upon.

LORD COZENS-HARDY M.R. This appeal raises a point of general importance to companies, whether under the Companies Acts or parliamentary companies governed by the Companies Clauses Act, 1845. The facts can be very shortly stated. The defendant company is a light railway company; it was incorporated in August, 1909. There were three directors, Sir W. H. Crundall, Lord Cowdray, and Sir John Jackson. The number of directors was originally to be five, but that number was properly reduced to three, of which two were to form a quorum. There was a qualification of shares for the directors. For reasons which do not concern us Lord Cowdray and Sir W. H. Crundall were minded to retire: they transferred all their shares and ceased to be eligible to act as or to be directors of the company. Sir John Jackson thus became sole director. What was his power? Under the Companies Clauses Act, 1845, as continuing director, he had power to fill up the vacancies on the board. The fact that a person exercising that power does not constitute a quorum is not really a relevant matter. The generality of the language used in s. 99 is so clear that it is impossible for us to overlook it. Any other view on that point would paralyse many a company. It is very common indeed to have a company the directors of which are merely the quorum, and therefore, unless there is a power for the continuing director or directors to fill up a vacant place in the directorate, the company would be at a deadlock, and nothing could be done except by the intervention of the Court in the manner suggested by Mellish L.J. in *Macdougall* v. *Gardiner* (1), an intervention which seems to me rather difficult to justify except on the ground of absolute necessity. I think, therefore, that Sir John Jackson had power to fill up the vacancy caused by the retirement of his two colleagues. That does not get over the difficulty. Assume he had the power, he could only appoint persons who had the requisite qualification as shareholders. What he did on July 29 of last year was this. He

(1) (1875) L. R. 10 Ch. 606.

purported to appoint Proffitt and Arthur Jackson to be directors, and at the same meeting, or subsequently on the same day, the necessary qualification shares were allotted to these two. That was not, in my opinion, sufficient to make Proffitt and Arthur Jackson directors, because the subsequent obtaining of qualification shares did not validate the original appointment. What happened was this. All the parties concerned, that is to say, Sir John Jackson, Proffitt, and A. Jackson, acting, as the learned judge has found, in perfect good faith, were not aware of the invalidity of the appointment by reason of the want of qualification, and they honestly believed that it was sufficient if contemporaneously with, although in point of time immediately after, their appointment they obtained the qualifying shares. What is the principle which ought to be applied in a case like that? The relevant section is s. 99 of the Companies Clauses Act, 1845. That section, or a section in equivalent terms, has been construed by this Court, and by Farwell J. as a judge of first instance, in a manner which is binding upon us. It is binding so far as it is a decision of the Court of Appeal whether we agree with it or not, and so far as it is a decision of Farwell J. it would be followed by us unless for good reason we came to the conclusion that it was wrong. It has been held by the Court of Appeal in *Dawson* v. *African Consolidated Land and Trading Co.* (1) that s. 99 is not limited to dealings between the company and outsiders, but that it applies also to dealings between the company and persons who are inside the company. I am using a neutral word as far as I can. It has also been held by Farwell J. that the words "notwithstanding it may be discovered afterwards that there was some defect" do not mean merely notwithstanding that the facts which shew the defect were afterwards made known, but that they mean notwithstanding that the defect itself, the defect arising from the facts, was afterwards discovered. That seems to me to be, if I may respectfully say so, plainly right. That is the view which Farwell J. in terms adopted in the case of *British Asbestos Co.* v. *Boyd* (2), and he applied it to the case in which the defendants to the action were directors themselves who were relying upon, acting upon, and claiming the benefit of s. 99, or

(1) [1898] 1 Ch. 6. (2) [1903] 2 Ch. 439.

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the equivalent section under the Companies Act, 1862. (1) It has been argued for the appellants with great force that this is a clause which ought not to be relied upon by persons who were aware of the facts, although not aware of the legal conclusions resulting from those facts, because such persons must be taken to know the law, and it would be wrong that they should take the benefit of s. 99. I am quite unable to accept that view. It seems to me that the question may be put very shortly: Aye or No, were the parties in this transaction acting in good faith? If they were, s. 99 ought to be available for all parties, including the directors themselves. If there is a lack of good faith, then of course the Court will not allow those who are lacking in good faith to take the benefit of it. Our attention has been called to a decision of Kekewich J. in *In re Staffordshire Gas and Coke Co.* (2), in which he took the view that the section applied only where the parties had no notice of the actual defect in point of fact. Sargant J. passed that case by with the remark that it was before the decision of this Court in *Dawson* v. *African Consolidated Land and Trading Co.* (3), and, of course, before the decision of Farwell J. in *British Asbestos Co.* v. *Boyd.* (4) I cannot but conclude, if the decision of the Court of Appeal in *Dawson* v. *African Consolidated Land and Trading Co.* (3) had been before the judge, that he would have taken a different view. So far as I am aware the decision of the learned judge in the *Staffordshire Case* (2) has never before been brought to the attention of the Court. It has never been followed, and I feel bound to say that I think it is wrong. If there is good faith, and I emphasize that, the mere fact that the person claiming the benefit of the section had notice of the existence of the facts which led to the disability is not sufficient to disentitle him to rely upon it if he can honestly say "I was not aware of the defect and the consequences of the facts I knew, I was not aware of the disqualification which now exists." That, I think, is really the point of the case. Lindley M.R. in *Dawson* v. *African Consolidated Land and Trading Co.* (3) points out very

(1) Sect. 67 [reproduced in s. 74 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69)].

(2) 66 L. T. 413.

(3) [1898] 1 Ch. 6.

(4) [1903] 2 Ch. 439.

forcibly that some such provision should apply to matters of this kind. The language of the section enables us to give it the wide interpretation which this Court and Farwell J. have attributed to it, and I should be sorry indeed that we should be tempted by the able argument we have heard to narrow the construction of that section, to narrow its highly beneficial and proper application in the manner we have been asked to. I think Sargant J.'s judgment in this case was perfectly right, and in my opinion the appeal should be dismissed with costs.

SWINFEN EADY L.J. I agree. In this case the company had fixed the quorum of directors at two, and the number of directors had been limited to three. It was further provided that the qualification of directors should be 250*l.*, that is to say, holding 25 shares of 10*l.* each. There were for a time three directors, Sir Weetman Pearson, afterwards Lord Cowdray, Sir John Jackson, and Sir William Crundall. Lord Cowdray and Sir William Crundall transferred their shares, and thereupon ceased to be directors, so that Sir John Jackson was the sole director. Being the sole director, he proposed to appoint two additional directors, and on July 29 there was a board meeting at which he was present and took the chair. The minute of that meeting runs: "Sir John Jackson as the sole remaining director appointed Mr. Arthur Jackson and Mr. John Proffitt as directors in place of Lord Cowdray and Sir William Crundall." Then the minute proceeds: "Mr. Arthur Jackson and Mr. John Proffitt accepted the office of director, Mr. Arthur Jackson applied for an allotment of twenty-five shares of the company, and Mr. John Proffitt for an allotment of twenty-four shares of the company, the latter making, with the one share already held by Mr. Proffitt, his qualification of twenty-five shares: the above shares were allotted to them respectively in accordance with their applications." The first question which arises is whether Sir John Jackson as the sole remaining director had power to appoint additional directors; in other words, whether he had power to fill up these casual vacancies which had occurred. The argument was that as there was less than a quorum of the board

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Sir John Jackson could not do so at all; it required at least two, and there was only one remaining director. In my opinion that is covered by s. 89 of the Companies Clauses Act, 1845, when read in connection with the interpretation clause. The interpretation clause, s. 3, says that in the Act the following words shall have the several meanings assigned to them unless there be something in the subject or the context repugnant to such construction; and then, "words importing the plural number only shall include the singular number." Then s. 89 provides: "If any director die or resign, or become disqualified or incompetent to act as a director, or cease to be a director by any other cause than that of going out of office by rotation as aforesaid, the remaining directors,"—in the plural—"if they think proper so to do, may elect in his place some other shareholder, duly qualified, to be a director." I think that the context requires that the words "the remaining directors" should include the case of a remaining director. It is obvious that the number of the board may, by death or resignation or otherwise, be so reduced that it may be below the quorum, as well as that there may be vacancies occurring in the board whilst still leaving a quorum, but in either case it is necessary or proper that the vacancy should be filled up. In my opinion the necessity of the case requires that "the remaining directors" should be read as including the case of a remaining director, so that if and so long as there is any remaining director he may proceed to fill up the board by appointing persons when casual vacancies occur. For these reasons I am of opinion that it was open to Sir John Jackson as the sole remaining director, under s. 89, to appoint duly qualified persons to be directors in the place of the two who had ceased to be members of the board. Then a slip was made. The appointed persons were not at the moment of the appointment qualified. They applied for and obtained their qualification, or thought they obtained their qualification, at the same meeting. It is manifest, it is not disputed, that a slip was made, and that in order for them to be validly appointed directors they must have had a qualification at the date of appointment, but nevertheless, acting in good faith, they accepted the shares and they acted and

continued to act as directors. The question is whether their acts as de facto directors are protected by s. 99 of the Companies Clauses Act, 1845. It has been said that in substance the law is stated in a very short passage in Buckley on the Companies Acts, 9th ed. p. 169, where it is summed up in these words: it is the note to s. 74 of the new Act: "Endangering accuracy for the sake of brevity, it may be said that the effect of this section is that, as between the company and persons having no notice to the contrary, directors &c. de facto are as good as directors &c. de jure." That is the note to s. 74 of the Companies (Consolidation) Act, 1908, but it is equally applicable to s. 99, which applies to companies governed by the Companies Clauses Act, 1845. It is now settled that this section protects acts both with regard to insiders and outsiders, and having regard to the law as laid down by the Court of Appeal in *Dawson* v. *African Consolidated Land and Trading Co.* (1), and to the view subsequently of Farwell J., with which I must say I entirely concur, I think that it is a beneficial construction to put upon the section. Common sense really requires that there shall be some provision giving legal effect to acts in respect of which there is a technical informality because some slip has been made, where the acts have been done in good faith and where the slip has occurred because the parties have not had present to their minds the legal difficulties in the way of doing what they honestly think they are entitled to do. In most of the cases that arise I think that the directors or persons acting as directors know the facts of the case, and of course are presumed to know the articles of the company, but it is not present to their minds that they are not carrying out the matter in a properly formal way. Here it does not appear to have been present to the minds of the two new directors that it was necessary for them to have had their qualification shares at the time of their appointment, and that it would not validate their appointment if they acquired them a moment afterwards. These matters were done at one and the same board meeting. I think that the judgment of Farwell J. in *British Asbestos Co.* v. *Boyd* (2) is not only good law but very good sound

(1) [1898] 1 Ch. 6. (2) [1903] 2 Ch. 439.

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common sense, and I entirely concur in it and in the judgment already pronounced by the Master of the Rolls.

PICKFORD L.J. I am of the same opinion. I do not think it necessary to add anything.

Solicitors: *Birkbeck, Yeo & Co.; Batten, Proffitt & Scott.*

G. A. S.

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July 17, 20, 30.

STEPHENS *v.* JUNIOR ARMY AND NAVY STORES, LIMITED.

[1913 S. 3381.]

Landlord and Tenant — Lease—Covenant to build — Covenant to repair — Covenant to deliver up—Continuing Breach—Waiver—Re-entry—Measure of Damages.

Where there is an express covenant to build, both as to time and mode of building, no further covenant to build can be implied from a covenant to repair.

Dictum of Stirling J. to the contrary in *Jacob* v. *Down* [1900] 2 Ch. 156 disapproved.

Waiver of forfeiture for not building in accordance with such a covenant carries with it a waiver of forfeiture for breach of a covenant to repair the said buildings if and when erected.

Decision of Joyce J. reversed.

APPEAL from a decision of Joyce J.

The following statement of facts is taken substantially from the judgment of Lord Cozens-Hardy M.R.

By a lease dated September 20, 1901, and made between the plaintiff of the one part and the defendants of the other part, the plaintiff demised unto the defendants for a term of ninety-nine years from June 24, 1901, certain hereditaments in the parish of Shipton Bellinger in the county of Hants at the yearly rent during the first five years of the said term of 6*l.* and thereafter of 50*l.* and subject to the covenants on the part of the lessee and the conditions therein contained.

The lease contained (amongst other provisions) covenants on the part of the defendants in the following terms:—"The

company do hereby for themselves their successors and assigns covenant with the lessor that they the company . . . . (1.) shall and will on or before the first day of July one thousand nine hundred and eleven at their own cost in all things erect and cover in and complete upon the said piece or parcel of land in a good workmanlike and substantial manner fit for the purposes of the business of the company with suitable materials of their several sorts shops or warehouses with or without dwelling rooms and with or without stables and dwelling houses the front elevation thereof to be in accordance with plans and drawings to be approved of by the lessor and to the reasonable satisfaction in all respects of the lessor and his surveyor the prime cost of which in material at current prices and labour shall not be less than the sum of two thousand pounds with all proper walls fences and necessary drains thereto (2.) And shall and will at their own expense well and sufficiently repair maintain paint paper whitewash pave scour cleanse empty amend and keep the said buildings and premises and all other erections and buildings which now are or at any time hereafter during the said term shall be erected and built on the said piece or parcel of land hereby demised together with the brick walls windows window shutters doors locks fastenings partitions ceilings floors chimney pieces stoves ranges shelves pavements water closets fences tanks cisterns sinks drains sewers pipes watercourses ways paths and passages which now are or at any time hereafter during the said term shall belong to the same respectively with all necessary repairs and amendments whatsoever and particularly will in a workmanlike manner paint with two good coats of oil paint the external wood and iron work and other outside parts usually painted of the said messuages stores and premises once in every third year of the said term and all the parts usually painted in the inside once in every seventh year (3.) And all the said premises so repaired maintained painted whitened coloured paved scoured cleansed emptied amended and kept will at the expiration or other sooner determination of the said term peaceably surrender unto the lessor and all fixtures and things which are or may at any time hereafter during the said term be fixed or fastened to or set up

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in or upon the said premises except tenants' fixtures whole undefaced and fit for use."

The lease contained a proviso for re-entry as follows:— "Provided always and it is hereby agreed and declared that if the said respective yearly rents hereby reserved or any part thereof respectively shall be unpaid for twenty-eight days next after any half-yearly day on which the same shall have become due whether legally demanded or not or if any of the covenants or agreements hereinbefore contained on the part of the company shall be broken or not observed performed and kept it shall be lawful for the lessor into the premises to re-enter and the same and every part thereof to have again as in his former estate as if these presents had never been made and thenceforth this demise shall be utterly void save as to such of the company's covenants as may then have been already broken and which covenants in respect of the then existing breaches thereof shall continue in force."

No building was erected in pursuance of the first covenant. There was a breach of that covenant on July 1, 1911, but the subsequent receipt of rent by the lessor was a waiver of that breach so far as re-entry was concerned. It was not in dispute that the defendants were liable to pay damages for breach of that covenant. On January 14, 1913, the plaintiff served notice upon the defendants of the breaches of the first and second covenants in accordance with the provisions of s. 14 of the Conveyancing Act, 1881. The writ was issued on November 5, 1913, and it claimed possession of the demised premises and 2000*l.* for breach of the covenants. The defendants denied the right of re-entry and stated that they had tendered the rent which the plaintiff had refused to accept.

By paragraph 7 of their statement of defence they said:

"The defendants while not admitting any of the allegations or contentions contained in paragraph 7 of the statement of claim are ready and willing and hereby offer to determine the said lease and to deliver up possession of the demised premises to the plaintiff."

Joyce J. granted relief in accordance with the plaintiff's claim.

The defendants appealed.

Younger, K.C., and *Austen-Cartmell*, for the appellants. Joyce J. reluctantly decided in favour of the plaintiff, being of opinion that he was bound to grant re-entry and damages for breach of the covenant to repair. It is submitted that the right of re-entry never arose at all and that the measure of damages was not the cost of the buildings to be erected, but the amount of damage sustained by the plaintiff in consequence of the non-erection of the buildings.

The covenant to repair related first to the premises covenanted to be built, and secondly any premises erected upon the land. The period for the erection of the buildings expired in July, 1911, and rent was received by the plaintiff on March 8, 1912, and the breach of the covenant to build was thereby waived. Notice was served on the defendants under s. 14 of the Conveyancing and Law of Property Act, 1881, and further rent was received by the plaintiff on July 4, 1912. On January 14, 1913, a further notice was served under s. 14, and no rent was thereafter received. The damages claimed under that notice were for breach of the covenant to keep in repair, and that is all that the plaintiff can recover in this action. By his receipt of rent after breach of the covenant to build the plaintiff waived the breach and lost his right to re-enter. If there had been no covenant to repair the plaintiff would not have been entitled to any relief in the action. The waiver of the covenant to build carried with it a waiver of the covenant to repair the buildings which ought to have been built. It is not contended that the plaintiff is not entitled to recover any damages, but that he is only entitled to recover the damage which he has actually sustained. The plaintiff cannot rely upon the subordinate covenant so as to claim possession by virtue of the primary covenant the breach of which he has waived. If the plaintiff had released the defendants from the covenant to build without reference to the covenant to repair, he could not then have enforced the latter covenant. The position is exactly the same where he has waived the former covenant.

It is suggested on behalf of the plaintiff that, assuming the covenant to build is gone, nevertheless the covenant to repair involves an obligation to build, but the submission is that the

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waiver of the covenant to build carries with it a waiver of the covenant to repair: *Jacob* v. *Down*. (1)

[LORD COZENS-HARDY M.R. There are dicta in that case which are against your contention.]

Yes, that is admitted, but a covenant to build cannot be found in the covenant to repair: *Sampson* v. *Easterby*. (2) If the covenant to repair stood alone, then a covenant to build might be implied. Not so where there is an express covenant to build. In *Bennett* v. *Herring* (3) there were dilapidated buildings to which the covenant to repair might be held to apply. There are no other cases upon which the view of Stirling J. in *Jacob* v. *Down* (1) can be founded. If the view opposed to our contention be upheld a curious result would follow. By waiving the right to re-enter for breach of the covenant to build and relying on the subsidiary covenant to repair the plaintiff would get damages in excess of those to which he would have been entitled if there had been no such waiver. The true measure of damages is the amount actually suffered or the real loss to the reversion: Mayne on Damages, 8th ed. p. 327, referring to *Oldershaw* v. *Holt* (4); *Marshall* v. *Mackintosh* (5); *Wigsell* v. *School for Indigent Blind*. (6) *Joyner* v. *Weeks* (7) is relied upon for the plaintiff, but that case does not apply to the case of a breach of covenant to build. It was simply a covenant to repair, and does not affect a case where the covenant to repair is merely ancillary to the covenant to build. *Oldershaw* v. *Holt* (4) was not referred to by the Court of Appeal in *Joyner* v. *Weeks*. (7) There is no right of re-entry here, and the learned judge in the Court below has adopted the wrong measure of damages.

Hughes, K.C., and *J. M. Gover*, for the respondent. *Joyner* v. *Weeks* (7) is the authority usually referred to on the question of damages, but there are many other cases on the subject. The rule is established that where the action is brought after the end of the term for a breach of a covenant to repair, the measure of damages is what it would have cost to do the repairs

(1) [1900] 2 Ch. 156.
(2) (1829) 9 B. & C. 505.
(3) (1857) 3 C. B. (N.S.) 370.
(4) (1840) 12 Ad. & E. 590.
(5) (1898) 78 L. T. 750.
(6) (1882) 8 Q. B. D. 357.
(7) [1891] 2 Q. B. 31.

under the lease. That is independent of what circumstances have occurred after the end of the term and of what the lessor proposes to do with the property. The previous cases are all dealt with in *Joyner* v. *Weeks* (1), which was cited in *Ebbetts* v. *Conquest*. (2) The measure of damages for breach of a covenant to deliver up in repair is the cost of putting the premises into repair; but there is a distinction between a covenant to keep and a covenant to yield up in repair. In *Ebbetts* v. *Conquest* (2) the action was brought during the term and the lessor was himself a lessee and liable to his lessor. It was held that the measure of damages was the same as it would have been after the end of the term. That is not this case. The rule that the measure of damages is the cost of putting the property into such repair as it ought to be in at the end of the term was approved in *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London* (3), where it is said that what actually happened must be looked at. In the present case the term is at an end; there was a right of re-entry and it has been exercised. Further, in the Court below the defendants agreed to surrender the term although they did not admit breach of covenant. There is no appeal from that part of the judgment which gave recovery of possession. The material question is what was the position at the date of the judgment, not at the date of the issue of the writ. It does not matter how the term has come to an end if in fact it has done so. The effect of what was done is to bring into operation the covenant to deliver up at the end of the term. We have accepted rent since the breach of the covenant to build and we cannot re-enter on that ground, but that does not take away our right to damages for breach of the other covenants: *Nouaille* v. *Flight*. (4) When the action is brought upon the covenant to repair at the end of the term the damages are such a sum as will put the premises into the state of repair in which the tenant was bound to leave them: Mayne on Damages, 8th ed. p. 319. That refers to the difference

(1) [1891] 2 Q. B. 31.
(2) [1895] 2 Ch. 377; [1896] A. C. 490; a subsequent action between same parties (1900) is reported 82 L. T. 560.
(3) [1912] A. C. 673, 691.
(4) (1844) 7 Beav. 521.

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between an action brought during the term and one brought after the determination of the term. The defendants have no right now to raise the point that we had no right of re-entry, although the learned judge acted on the footing that we had that right. There has been a continuing breach of the second covenant; we had a right of re-entry; and waiver of the first covenant is immaterial: *Penton* v. *Barnett.* (1) It is admitted that there is no case in which a covenant to repair has been held to apply to non-existing buildings. A covenant to keep in good repair imposes an obligation to put in repair: *Jacob* v. *Down* (2); *Proudfoot* v. *Hart* (3); *Bullock* v. *Dommitt.* (4) The obligation to repair is not limited by the time limit for building. Lessees cannot by breaking a covenant to build escape liability under a covenant to repair.

Younger, K.C., in reply, referred to Platt on Covenants, p. 289.

Cur. adv. vult.

July 30. LORD COZENS-HARDY M.R. stated the facts and proceeded: Two points were argued before us, namely, (1.) had the plaintiff a right of re-entry, and, if so, (2.) what were the damages to which he was entitled. The importance of the second question depends upon the fact that the damages for breach of the covenant to rebuild during the term will not be 2000*l.*, whereas a claim for damages after the expiration of the term may, it is contended, be maintained for the fixed sum of 2000*l.*

The first question seems to me to depend upon what is the true construction of the lease itself. Now there is an express covenant to build before July 1, 1911. Then follows a covenant to repair "the said buildings and premises," words which seem to me plainly to refer to the buildings contemplated in the first covenant. Then follow the words "and all other erections and buildings which at any time are erected on the land." Nothing has ever been erected and the land is now in the same state as when the lease was granted. In my opinion, as a matter of construction, there is nothing upon which the second covenant can operate. It presupposes the existence of buildings on the site:

(1) [1898] 1 Q. B. 276.
(2) [1900] 2 Ch. 156, 160, 161.
(3) (1890) 25 Q. B. D. 42.
(4) (1796) 6 T. R. 650.

Taylor v. *Caldwell*. (1) Unless the covenant to repair and maintain is to be taken as an implied covenant to build, I can see no obligation in respect thereof. The express covenant to build before July 1, 1911, which could only be broken once, seems to negative the existence of any implied covenant. I am not aware of any direct authority upon this point, but there are some dicta in *Jacob* v. *Down* (2) which deserve careful consideration. In that case there was a covenant to pull down some old houses and to erect new houses within twelve months at a cost of not less than 2500*l*., and there was also a covenant to repair and keep in repair and to deliver up in good repair. Nothing was done by the lessee. Notice was given under the Conveyancing Act based upon breach of the covenant to build. Stirling J. held that the action failed because there had been subsequent receipt of rent which amounted to a waiver so far as concerned any right of re-entry in respect of that covenant. But Stirling J. held that although there was no continuing breach of the building covenant there was a continuing breach of the repairing covenant, and he expressed the view that the repairing covenant imposed an obligation to do everything necessary in order that the premises might be found during the term in existence and in a proper state of repair. This was not necessary to the decision of the case, and, with the utmost respect, I am unable to assent to that view. The well-known obligation of a lessee to rebuild demised premises which have been destroyed by fire seems to throw little light upon the question. An express covenant to build within ten years, which could only be broken once, cannot be consistent with an implied covenant to build, which might be continuously broken. If I am right in this view, the plaintiff has no right of re-entry, and is not entitled to recover possession, and the action, so far, fails. It is not necessary to consider the question as to the measure of damages which the plaintiff could claim in an event which has not happened. In my opinion, the lease is still in force. The defendants are liable to pay rent under the lease and are also liable to pay damages for breach of the covenant to build. That, however, is not the substantial case

(1) (1863) 3 B. & S. 826. (2) [1900] 2 Ch. 156.

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raised by this action. The plaintiff attempted to rely upon the offer, which was not accepted by him, in paragraph 7 of the defence to determine the lease and to deliver up possession and suggested that there was a voluntary surrender of the term. But that is inconsistent with the pleadings and with the arguments in the Court below and with the order under appeal. Nothing has happened which can prevent the defendants from asserting that the plaintiff is not entitled to recover possession.

In my opinion, the judgment of the learned judge cannot be supported. The appeal must be allowed. The form of the order will be stated by Swinfen Eady L.J.

Swinfen Eady L.J. In this action the plaintiff claims possession of a parcel of land of about two acres at Shipton Bellinger, Hampshire, under a power to re-enter contained in a lease dated September 20, 1901, and he also claims damages for breaches of certain covenants contained in the same lease. The first question is whether the plaintiff has established a right to re-enter. It was contended on his behalf that this point was not now open to the defendants, as at the trial they had offered to surrender their lease, which they no longer desired to retain. But this is a misconception of the position. The defendants would have been willing to give up possession in order to terminate all disputes, but they insisted that the plaintiff had not any right of re-entry, and that there was not any breach of covenant upon which the plaintiff could re-enter; the plaintiff's counsel answered that he would satisfy the Court that there was; and thereupon the action proceeded to determine whether there was any such right. The case was argued out upon that footing. The judge gave judgment on that point, holding that there was not any answer to the claim of the plaintiff to recover judgment under the power of re-entry. The judgment as drawn up orders "that the plaintiff do recover possession from the defendants of the hereditaments"—and then follows a description of them. The point that the plaintiff recovered possession by a voluntary surrender of the term by the defendants to the plaintiff cannot be upheld. He recovered possession by force of an adverse judgment, the judge deciding that he was entitled

to re-enter under the provisions of the lease. The first question, therefore, is whether the judgment was right on this point. There is no dispute as to the material facts. [His Lordship stated them.]

The defendants say that the piece of land is about a mile and a half from Tidworth, where the Government have built barracks; that at the date of the lease the Government contemplated building barracks at Tidworth for some 20,000 men, and that the defendants contemplated setting up a depot to supply the troops, and for that purpose took this lease of a plot of land in an agricultural village; but that subsequently Government plans changed, and accommodation for a very much smaller number of troops was provided, and so the defendants abandoned their intention of building shops or warehouses. But whatever the defendants' reason may have been, it is common ground that they committed a breach of the covenant to build the shops or warehouses within the ten years; no buildings at all have been erected on the land. It is also common ground that the plaintiff has waived any forfeiture or right of re-entry for breach of that covenant, having accepted rent up to June 24, 1912, with knowledge of the facts. It is also not disputed that this waiver operates once for all, and that the covenant to build on or before a date which is past is not a continuing covenant. The plaintiff, however, bases his right to re-enter upon an alleged breach of the next covenant. He has contended that the covenant to repair, maintain, and keep "the said buildings and premises" in itself imports an obligation to build them, if not already built under the first covenant, and that for breach of this alleged implied continuing covenant to build he can now re-enter. The defendants, on the other hand, contend that in the face of the express covenant to build there is no room for implying any further covenant; that the covenant to repair, maintain, and keep "the said buildings and premises" must be construed to mean—and can only mean—the said buildings to be erected within the ten years, if and when so erected; that the repair of any other erections and buildings which may be erected during the term are provided for by the words which immediately follow; and that in any case the covenant to repair the intended

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new buildings particularly mentioned in the lease is accessory to the covenant to erect them, and when the forfeiture for not erecting the buildings pursuant to the first covenant was waived, any forfeiture for not repairing those buildings was necessarily waived with it. Now it is obvious that, as a matter of construction, the covenant to repair, maintain, and keep "the said buildings and premises" must under some circumstances be construed as if it contained the words "if and when erected." If at the end of the first eight years of the term the buildings had been erected, and were then out of repair, there would have been a breach of that covenant; if, however, at the end of the same eight years no buildings had been erected, there would not have been any breach of that covenant to repair. The plaintiff is, indeed, driven to contend that the implied covenant which he alleges is a covenant to erect and build the said shops or warehouses—not at once, nor within the ten years' period, but either immediately afterwards, or within some indefinite time afterwards, if not duly built by the lessees in accordance with their express covenant in that behalf. In my opinion, no such covenant can be implied; "expressum facit cessare tacitum." There is here an express covenant, both as to time and mode of building, and no further covenant to build can be implied from the covenant to repair. The rule is that where a deed contains express covenants, no implication of any other covenants on the same subject-matter can be raised: *Nokes's Case* (1); *Line* v. *Stephenson* (2), affirmed in the Exchequer Chamber (3), where Lord Denman observed that to decide otherwise would be to violate the first principles of the construction of deeds, as established by *Nokes's Case.* (1) See also *Clarke* v. *Samson.* (4)

The plaintiff contended, as matter of law, that wherever a lease contained a covenant to repair buildings, there must be implied a covenant to erect, if not already erected, and that the covenant to repair was broken by not erecting. In *Lant* v. *Norris* (5), an action of covenant was brought upon a lease of a piece of ground with certain old messuages upon it, which lease

(1) (1599) 4 Rep. 80b.
(2) (1838) 4 Bing. N. C. 678.
(3) 5 Bing. N. C. 183.
(4) (1748) 1 Ves. Sen. 100.
(5) (1757) 1 Burr. 287.

contained a covenant to expend 200*l.* in erecting and rebuilding the messuages within the first fifteen years of the term, and from time to time to repair the said messuages so to be erected and to yield up "the said demised premises with all such other houses &c. so well repaired &c. at the end or other sooner determination of the said term." The action was brought on the covenant during the term, but after the first fifteen years had expired, to recover damages on the ground that "the demised premises" were out of repair. For the defendant it was contended that according to the true construction of the lease it was never intended that the old buildings should be repaired, and that as regards the new buildings it was not alleged in the declaration that they had ever been built, which was a necessary averment, for "without such erection, the defendant could not be obliged to repair." Denison J. pointed out that the covenant to repair was confined to the tenements to be erected. And, after taking time to consider, Lord Mansfield, in delivering the judgment of the Court, said that the Court was extremely clear that it was not intended that the old buildings should be repaired; and as to the new, whatever the lessee should erect should be kept in repair. And judgment was given for the defendant. This is an authority for the proposition that a covenant to repair buildings to be erected pursuant to an express covenant is not broken by the mere non-erection of the buildings and that in such case the covenant to repair does not of itself import an additional covenant to build. The plaintiff relied upon the dicta of Stirling J. in *Jacob* v. *Down*. (1) It was an action to recover possession of land for alleged breach of covenant in a lease. The lease contained a covenant to build certain messuages within twelve months at a cost of not less than 2500*l.* and to keep the messuages so to be erected in good and substantial repair. The time had expired and the messuages had not been built. A notice had been served under the Conveyancing Act, 1881, which set out only the covenant to build, stated the breach of that, and called upon the defendants to erect the buildings, in default of which the lessor would sue for possession. The statement of claim did not mention the covenant to repair. The judge

(1) [1900] 2 Ch. 156.

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dismissed the action on the ground that the breach of the covenant to build had been waived by the acceptance of rent. He also pointed out that the breach of the covenant to repair could not be relied upon, as no notice under the Conveyancing Act had been given in respect of that covenant. There are, however, observations which go to shew that the judge thought that a further covenant to build would be implied from the covenant to repair. But with regard to the cases referred to in his judgment, and which he wished to follow, the houses in *Bennett* v. *Herring* (1) were in existence—indeed roofed in—at the date of the demise; and Willes J. said: "The covenant now under consideration is to repair that which is demised." In *Sampson* v. *Easterby* (2) the covenant to build the smelting mill was not implied from the covenant to keep the new mill in repair, but from the recital in the lease of an antecedent agreement to build the mill, there not being any express covenant to build it. This appears also from the report of the case in the Exchequer Chamber sub nom. *Easterby* v. *Sampson* (3), where Alexander C.B. said: "We are all of opinion that in this demise there is a distinct covenant on the part of the defendant below to erect a smelting mill. Any words in a deed which show an agreement to do a thing amount to a covenant: Com. Dig. 'Covenant,' and here it is recited, that the defendant and others had, with the permission of Sir C. Turner and two others, taken down a smelting mill, and did engage to erect at their own expense a smelting mill of larger dimensions." It is true that Stirling J. in *Jacob* v. *Down* (4) added that if the covenant to repair did not include an obligation to erect, if the buildings were not completed within the period prescribed by the building covenant, the lessee by omitting to perform the building covenant might practically escape from any obligations of the lease. But this observation does not appear well founded. For breach of the covenant to erect the lessee remains liable in damages; and if at any time during the term the buildings should be erected, the covenant to keep them in repair remains in full force. In my opinion the admitted waiver of forfeiture

(1) 3 C. B. (N.S.) 370, 374
(2) 9 B. & C. 505.
(3) (1830) 6 Bing. 644, 650.
(4) [1900] 2 Ch. 156, 182.

for not building extends to and carries with it a waiver of any forfeiture for non-repair, as it is impossible to repair or keep in repair what has never been built. Moreover, it would be quite unreasonable to imply a further covenant to build, and then to hold that forfeiture had arisen for not building pursuant to the implied covenant when the forfeiture for not building pursuant to the express covenant had been waived. In my opinion, there has not been any such forfeiture, and the plaintiff has failed to establish any right of re-entry.

The plaintiff is, however, entitled to recover damages for breach of the covenant to build, upon the footing that the present action is brought during the continuance of the term. The measure of damages for the breach of this covenant to build will be the loss (if any) thereby occasioned to the lessor's reversion: see per Lopes L.J. in *Ebbetts* v. *Conquest* (1), affirmed by the House of Lords. (2)

Some question arose as to what would be the measure of damages if the action were brought at the expiration or sooner determination of the term for breach of the covenant to yield up, but we are not now concerned with any such question.

In my opinion the appeal should be allowed.

PICKFORD L.J. stated the facts and continued: It was admitted that the breach of the covenant to build before July 1, 1911, was not a continuing one and was complete on that date, and that the right of re-entry in respect of it had been waived, but it was contended that the covenant to repair implied an obligation to build in order to repair, in the same way that a covenant to keep buildings in good repair implies an obligation to put them in such repair; and that there was therefore a breach of that covenant which gave a right of re-entry. It was also contended that under these circumstances the term was at an end at the commencement of the action, and that the plaintiff was entitled to damages for the breach of the covenant to surrender the buildings in good condition. The measure of these damages was alleged, on the authority of *Joyner* v. *Weeks* (3), to be the cost of

(1) [1895] 2 Ch. 377, 384. (2) [1896] A. C. 490.
(3) [1891] 2 Q. B. 31.

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building the buildings, that is to say, 2000*l.*, and not the actual loss sustained by the plaintiff. The defendants contended that there was no such obligation implied in the covenant to repair and therefore no right of re-entry, that the term was not at an end and therefore there was no breach of the covenant to surrender, and the measure of damages for not building was the actual loss to the plaintiff. Joyce J. gave judgment for the plaintiff for possession of the land and 2000*l.* damages, and against that judgment this appeal is brought.

On the hearing of the appeal it was argued on behalf of the plaintiff that it was immaterial whether there was a right of re-entry or not, because the defendants before Joyce J. had agreed to surrender the lease, and therefore the term was at an end and the damages were to be assessed on that basis. I do not think that that is the correct view of what took place at the trial. I think that the defendants contested the right to re-entry and were only willing to give up the land which they no longer wanted on the terms that damages should be assessed on the basis of the continuance of the term. This was not accepted, and there was therefore no surrender of the lease, and if there is no right of re-entry the term is still continuing. The form of the judgment of Joyce J. confirms my view of what took place at the trial. We have therefore to determine whether the plaintiff had a right of re-entry, and this depends upon whether there was a breach of the covenant to repair. If that covenant implied an obligation to build in order to repair there was such a breach; if it did not, and the obligation was only to repair such buildings as were built, there was no breach, but the plaintiff would be entitled to damages for breach of the express covenant to build. Such damages, however, would in that case be assessed on the basis of the continuance of the term. We have therefore to determine whether the covenant to repair does impose such an obligation. On the face of it the covenant is to repair and maintain the said buildings, that is to say, the buildings mentioned in the express covenant to build. Those buildings have not been built and cannot be repaired. It is, however, argued that a covenant to repair and maintain in repair implies an obligation to erect buildings which can be repaired

and that the expression "the said buildings" only refers to the description of buildings and not to those particularly mentioned in the covenant. On this construction there is a continuing obligation to erect buildings of the description mentioned, with, however, a provision that the tenant shall have ten years in which to build them and that during those ten years there is no breach of the obligation implied in the covenant to repair. It follows that the day after the plaintiff had waived the express covenant to build he could re-enter for a breach of the obligation to build the same buildings contained in the repairing covenant. I do not think that this is the true construction. I think that the repairing covenant attaches only to the buildings when built, and does not in a lease where there is an express building covenant imply an obligation to build. A different opinion was expressed by Stirling L.J. (then Stirling J.) in *Jacob* v. *Down* (1), on the authority of the cases of *Bennett* v. *Herring* (2) and *Sampson* v. *Easterby*. (3) These cases do not, however, support the proposition. In *Bennett* v. *Herring* (2) there were existing buildings to which the covenant attached, and in *Sampson* v. *Easterby* (3) the obligation to build was implied not from the covenant to repair but from a recital. There was no express covenant as in this case. With the exception of this case we were not referred to any authority in which a covenant to repair had been held to attach to any but existing buildings. The case of *Lant* v. *Norris* (4) is also opposed to such an implied obligation.

I think that there was no breach of the covenant to repair, and therefore no right of re-entry, and that the term is still in existence. The plaintiff therefore cannot recover possession, and the damages to which he is entitled for the breach of the covenant to build must be assessed on that basis.

The result is that the appeal must be allowed.

Swinfen Eady L.J. The judgment will go in this form: Allow the appeal and discharge the order of Joyce J. Dismiss the action except so far as it claims damages for breach of the

(1) [1900] 2 Ch. 156.
(2) 3 C. B. (N.S.) 370.
(3) 9 B. & C. 505.
(4) 1 Burr. 287.

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covenants in the lease of September 20 in the statement of claim mentioned to erect shops or warehouses on or before July 1, 1911. The plaintiff to pay to the defendants the costs of the action except such costs as would have been incurred if the action had been brought only to recover damages for breach of the said covenant and upon the footing that the lease was still subsisting. Reserve excepted costs to be dealt with by the judge after the Master shall have made his certificate under the inquiry hereinafter directed. The plaintiff to pay to the defendants the costs of the appeal. Let the following inquiry be made, that is to say, an inquiry what damages (if any) the plaintiff has sustained by reason of the breach by the defendants of the said covenant to erect, such damages being assessed upon the footing that the said lease is still subsisting and that the plaintiff has not established any right to re-enter. Reserve the costs of the inquiry to be dealt with by the judge. Liberty to apply after the Master shall have made his certificate, and general liberty to apply.

Solicitors: *Coward & Hawksley, Sons & Chance; Mills & Morley.*

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[1913 S. 3098.]

Vendor and Purchaser—Contract—Enjoyment of Light—Agreement that Light enjoyed by Licence—Non-disclosure—Specific Performance—Forcing Doubtful Title on Purchaser—Doubt if Agreement binds Land.

A contract to sell buildings described by a plan which shews windows does not imply any warranty of a legal right to the access of light to those windows.

The existence of an agreement which prevents the statutory period of prescription beginning to run does not create an incumbrance on the property, and the non-disclosure of such an agreement does not invalidate the contract. A clause in such an agreement that the owner of the buildings will block up the windows is an affirmative covenant only and cannot be enforced against subsequent purchasers under the doctrine of *Tulk* v. *Moxhay* (1848) 2 Ph. 774.

A further clause in such an agreement that the adjoining owner may enter and build up the windows in default of the owner of the buildings doing so is a mere revocable licence and does not give the adjoining owner any interest in the land, and if it did give such an interest it would be void for perpetuity.

None of the points mentioned above make the title too doubtful to be forced upon a purchaser.

Greenhalgh v. *Brindley* [1901] 2 Ch. 324, *Haywood* v. *Brunswick Permanent Benefit Building Society* (1881) 8 Q. B. D. 403, and *Alexander* v. *Mills* (1870) L. R. 6 Ch. 124 followed and applied.

Decision of Astbury J., reversed.

By an indenture dated November 21, 1900, and made between Joseph Smith of the one part and the defendant, James Colbourne, of the other part, the messuages, shops, warehouse, show-rooms, buildings and premises known as Nos. 62A, 63, and 64, North Street, Brighton, together with the right of way therein mentioned, and also two messuages known as Nos. 65 and 66, North Street, aforesaid, but having a frontage to West Street, were demised to the defendant for the term of twenty-eight years from September 29, 1900, at the rent therein mentioned. The said lease contained a covenant that if the said Joseph Smith should die before the expiration of the said term of twenty-eight years the defendant, his executors, administrators, or assigns, would within one year from his death purchase and the legal personal representatives of the said Joseph Smith and all other necessary

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parties (if any) would convey and assure to the defendant, his executors, administrators, and assigns, the fee simple in possession of the first mentioned premises, and also the secondly mentioned premises for the term of ninety-nine years from Michaelmas, 1874, for the sum of 16,875*l.*

The business carried on by Joseph Smith was purchased by the defendant at the time the said lease was granted and had ever since been carried on by him.

Joseph Smith died on October 7, 1912, having by his will appointed the plaintiffs executors, and they had proved the will. The plaintiffs had delivered an abstract of title to the defendant, and required him to purchase the property according to his covenant, and, as he declined to do so, brought this action for specific performance.

The defendant raised two objections to the title—(1.) that no title was shewn to the right of way, but this was withdrawn before the hearing; (2.) that at and many years before the date of the lease Joseph Smith had carried on upon the premises demised by the lease the business of a draper and silk mercer, and had fitted up and used the premises No. 62A as show-rooms. The show-room which occupied the whole of the ground floor of No. 62A was at the date of the lease lighted at its north end by three windows in its east wall, and at its south end by two windows in its west wall. The first floor was fitted up and used, except at its extreme northern end, as a show-room, which was lighted to a small extent at its southern end by a skylight, and elsewhere by three windows in the east wall. The northern end of the first floor was occupied as an office and a counting-house, each of which was lighted by a window in the east wall. The defendant on investigating the title of the plaintiffs for the first time discovered that two windows in the west wall of the ground floor were opened, or kept open, by the said Joseph Smith on sufferance under the terms of an agreement dated March 31, 1890, and made between four persons of the name of Crunden (hereinafter called "the Crundens") of the one part and Joseph Smith of the other part; and that two of the three windows in the east wall lighting the show-room on the first floor and the said window in

the same wall which lighted the counting-house were opened, or kept open, by the said Joseph Smith under the terms of an agreement dated March 31, 1890, and made between Henry John Infield and the said Joseph Smith.

The agreement with the Crundens recited that they were the owners in fee of the premises and yard adjoining the messuages and premises of which the said Joseph Smith was the owner; and it was agreed as follows: "(1.) The two windows shewn on the plan annexed hereto" (being the said two windows in the west wall of the ground floor of No. 62A, North Street) "have been and are constructed and opened with the express licence of the Crundens and the enjoyment hereafter by the said Joseph Smith his heirs and assigns of the access and use of light and air to his said premises by means of the said openings or windows shall be deemed to be with the express licence of the Crundens and of all persons deriving title under them To the intent that the said Joseph Smith his heirs and assigns shall not acquire any easement or right in respect thereof.

"(2.) That the said windows shall not open outwards and shall at all times be kept glazed with opaque glass.

"(3.) The Crundens and all persons deriving title under them may at any time hereafter determine the said licence by giving to the said Joseph Smith his heirs or assigns or leaving for him or them at the said premises in North Street a notice in writing to that effect and every such notice shall be sufficient although not addressed to any person or persons by name or designation and notwithstanding that the person or any of the persons affected thereby may be unborn unascertained or under disability.

"(4.) Within one calendar month from the receipt or delivery of any such notice as aforesaid the said Joseph Smith his heirs or assigns will remove the said windows and fill up the openings with like material as the wall in which the same is made And in default of his or their so doing the Crundens and all persons deriving title under them may at any time thereafter at the expense of the said Joseph Smith his heirs or assigns enter upon the said premises in North Street and remove such windows and fill up such openings in manner aforesaid.

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"(5.) Notice of this agreement is or shall be indorsed on the conveyance of the said premises in North Street to the said Joseph Smith or upon some other leading and modern document of title relating to the same premises."

The agreement with H. J. Infield related to two of the three windows in the east wall of the show-room on the first floor and the window in the east wall of the counting-house on the same floor, and was in precisely the same terms as that with the Crundens, except that H. J. Infield only held his premises for a term of eighty-two years and the agreement was limited to that time. The other windows above mentioned were ancient lights.

The defence alleged that the light through the windows subject to the said agreements was necessary for the purpose of carrying on the business; that the defendant did not know of the existence of the agreements when he entered into the contract to purchase, and they ought to have been disclosed, and that the non-disclosure constituted a material misdescription of the premises of such a character as to relieve the defendant from his obligations under the contract.

The case came on before Astbury J. on March 18 and 19, 1914, when he allowed the objections and dismissed the action.

The plaintiffs appealed.

Upjohn, K.C., and *J. G. Wood*, for the appellant. In *Greenhalgh* v. *Brindley* (1) Farwell J. laid down the rule that a contract for the sale of a house with windows overlooking adjacent land implies no representation or warranty that the windows are entitled to the access of light over that land, and that the non-disclosure of an agreement precisely similar to those in the present case was no reason for refusing specific performance. That is recognized as law in all the text-books—see Dart on Vendors and Purchasers, 7th ed. vol. i. p. 133, vol. ii. p. 1194—and has never been doubted. If the agreements in this case passed an interest to the covenantees they are void for perpetuity, and if they do not they are mere licences to do an act otherwise illegal and the purchaser can revoke them at any time. It was argued below that "window" means window with

(1) [1901] 2 Ch. 324.

a right to access of light thereto, and that the agreements created an outstanding interest in the covenantees. The first point is disposed of by *Greenhalgh* v. *Brindley* (1), and as to the other the agreements do not give the covenantees any interest, they merely prevent the purchaser acquiring a right to light under the Prescription Act. The agreements to stop up the window if required and to use opaque glass are affirmative covenants, and the purchaser is not bound by notice within the principle of *Tulk* v. *Moxhay* (2): see *Haywood* v. *Brunswick Permanent Benefit Building Society.* (3) The power for the adjoining owners to enter and block up is a mere licence which gives no interest, is revocable at any time, and is revoked by a change of interest: *Thomas* v. *Sorrell* (4); *Wallis* v. *Harrison.* (5)

If the agreements did create any interest they would be void for remoteness: see *London and South Western Ry. Co.* v. *Gomm.* (6) It is not the modern practice to refuse specific performance because the title is doubtful. The Court decides any question which may arise on the title and acts on its decision. But there is really no doubt at all in this case. Astbury J.'s judgment proceeds on the ground that these agreements are binding on the property, but they are not.

Younger, *K.C.*, and *Sheldon*, for the respondent. The testator and his neighbours in this case clearly intended to make agreements which would be binding on their successors.

The doctrine that *Tulk* v. *Moxhay* (2) applies only to negative covenants only governs the case of simple affirmative covenants with no negative element. Lord Selborne in his judgment in *Wolverhampton and Walsall Ry. Co.* v. *London and North Western Ry. Co.* (7) says that in each case the substance of the covenant must be looked at, not merely the form. In *Tulk* v. *Moxhay* (2) itself the covenant was affirmative in form but a negative covenant was implied. In this case the agreements are in substance that Smith and his successors shall have no windows in these walls except by the consent of their neighbours, and

(1) [1901] 2 Ch. 324.
(2) 2 Ph. 774.
(3) 8 Q. B. D. 403.
(4) (1672) Vaugh. 330, 351.
(5) (1838) 4 M. & W. 538.
(6) (1882) 20 Ch. D. 562.
(7) (1873) L. R. 16 Eq. 433, 437.

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then only with opaque glass. A precisely similar covenant was enforced by the Court of Appeal in *Bewley* v. *Atkinson*. (1) It is a negative covenant, and the purchaser can never terminate it or acquire a permanent right to light to these windows. They are absolutely essential to his business.

The limitations on *Tulk* v. *Moxhay* (2) were discussed in *Austerberry* v. *Oldham Corporation* (3) and *Whitwood Chemical Co.* v. *Hardman* (4), but in both cases it is admitted that a negative covenant may be implied, and in the latter case Lindley L.J. approves the rule laid down by Lord Selborne in *Wolverhampton and Walsall Ry. Co.* v. *London and North Western Ry. Co.* (5)

A power of entry is an easement: *South Eastern Ry. Co.* v. *Associated Portland Cement Manufacturers*. (6)

We admit that according to modern decisions the Court requires a strong case to make it refuse specific performance on the ground that the title is doubtful. The Court will usually decide the point. But in *Bristow* v. *Wood* (7) the Court refused to force the title on a purchaser because of a doubt whether a covenant ran with the land.

Upjohn, K.C., in reply.

Cur. adv. vult.

July 30. LORD COZENS-HARDY M.R. This is an action for specific performance of a contract to purchase some houses at Brighton. The purchaser has objected to the title, and Astbury J. has allowed the objection and dismissed the action with costs.

The contract to purchase is contained in a lease dated November 21, 1900, under which, in an event which has happened, the defendant agreed to purchase the demised property for 16,875*l*. The property is described as messuages, shops, warehouse, show-rooms, buildings and premises described on a plan. There is no express mention of windows. In my

(1) (1879) 13 Ch. D. 283.
(2) 2 Ph. 774.
(3) (1885) 29 Ch. D. 750.
(4) [1891] 2 Ch. 416, 426.
(5) L. R. 16 Eq. 433.
(6) [1910] 1 Ch. 12.
(7) (1844) 1 Coll. 480.

opinion there is no warranty in such a contract that the de facto windows are ancient lights. *Greenhalgh* v. *Brindley* (1) is a direct authority on this point, and I desire fully to adopt Farwell J.'s judgment—a judgment based upon general principles and not upon the facts of the particular case. Does a consent in writing which prevents the statutory period of prescription from beginning to run create an incumbrance on the property? I think not. Farwell J.'s judgment is again a distinct authority. "The vendor does not fail to possess the fee simple free from incumbrances of a house because he has not got the easement of light over the adjoining property, nor because the time necessary for acquiring that easement has not commenced to run." If the consent in writing does not create an incumbrance, there is no obligation to put it on the abstract. The only objection taken before us is based upon an agreement dated in 1890 between adjoining owners named Crunden and Joseph Smith, a predecessor in title of the defendant. I take one of those two agreements because they are in the same form. [The Master of the Rolls read shortly the agreement with Crunden above set out, and continued:] What is the effect of this agreement? It is positive in form, not negative. A purchaser from Smith would not be under any liability to perform the obligations entered into by Smith. He could not, under the principle of *Tulk* v. *Moxhay* (2), be called upon to do anything involving the expenditure of money. The agreement can be denounced at any time by Smith or persons claiming under him, and the statute, which had no operation during the continuance of the agreement, would immediately begin to run. But it is said that *Bewley* v. *Atkinson* (3) is inconsistent with this view. I think a careful examination of that case will shew that the argument has no foundation. It was an action to restrain the owner of the servient tenement from blocking up windows which had been enjoyed since 1814. The defence was that the windows had been opened and allowed to remain open under the written licence, consent, or agreement of the defendant's predecessor in 1814. The agreement which the Court was dealing with was in these

(1) [1901] 2 Ch. 324, 328.
(2) 2 Ph. 774.
(3) 13 Ch. D. 283.

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terms ; it is dated August, 1814 : " Whereas I, Isaac Kirkbride, of Whitehaven, in the county of Cumberland, cabinet maker, have lately put out four windows or lights from my shop or premises in King Street, in Whitehaven aforesaid, which face into or overlook the backyard or grounds of a dwelling-house and premises late the property of John Pearson, of Staple Inn, London, gentleman, but now of Henry Spencer, of Whitehaven, aforesaid, weaver, Now I do hereby declare that those windows or lights above mentioned are put out and remain upon the leave or indulgence of the said Henry Spencer, and that I will, upon the request of him or his heirs or assigns to be made at any time hereafter, wall or block up the same, and in the meantime, until such request is made as aforesaid, I hereby promise to pay unto the said Henry Spencer, his heirs and assigns, the sum of sixpence yearly and every year, to commence and take effect from the day of the date hereof in consideration of such indulgence." Sixpence a year was paid up to 1859 but no longer. The agreement had never been denounced. The decision was that, notwithstanding the cessation of payment of sixpence a year in 1859, the agreement was, under s. 3 of the Prescription Act, 1832, sufficient to prevent the acquisition of an indefeasible title to the light. That is the only point which was decided. The case has been often cited, by Farwell J. amongst others, but never for the purpose of establishing that the agreement imposed obligations upon the purchasers. It was a weapon of defence, not of offence. Any expressions which, apart from the context, might be held to have a larger meaning cannot properly be so regarded. It is beyond controversy that the purchaser could not be liable to pay the sixpence a year, or to spend money in blocking up the windows.

It was further urged that the agreement though affirmative in form implied a negative. This, however, is not correct except in the sense that every agreement to do A implies an agreement not to do B, and this Court has repeatedly held that such an implied negative is not sufficient to bring the case within *Tulk* v. *Moxhay*. (1) The words most relied upon in argument were those

(1) 2 Ph. 774.

in clause 2. But, in my opinion, they are not sufficient for the purpose.

It was further urged that the words at the end of clause 4 gave a right of entry, and therefore an interest in the land. I think it is a mere licence, but if it is more, it seems to be void as a perpetuity.

Lastly it was urged that the title is too doubtful to be forced upon a purchaser. The Courts have in modern times not listened with favour to such a defence. It is the duty of the Court, unless in very exceptional circumstances, to decide the rights between the vendor and the purchaser, even though a third person not a party to the action will not be bound by the decision.

For these reasons I think the appeal must be allowed. The usual decree for specific performance must be made, and the defendant must pay the costs here and below.

SWINFEN EADY L.J. The plaintiffs claim specific performance of an agreement by the defendant to purchase certain shops, warehouses, and premises at Brighton for 16,875*l*. The agreement is contained in a lease dated November 21, 1900, under which the purchaser is in possession; he agreed to purchase within one year from the death of Joseph Smith, which happened on October 7, 1912. The premises are partly freehold and partly leasehold. The defendant raises an objection to title, or, as he puts it, to subject-matter. The premises agreed to be sold include a warehouse at the rear; in the east wall of this warehouse there are three ancient windows or lights on the ground floor, and there are five windows on the first floor, of which two only are ancient, and the remaining three are the subject of an agreement dated March 31, 1890, entered into between Joseph Smith, the plaintiffs' testator, and Henry John Infield, the owner of the adjoining premises; in the west wall of the warehouse there are two windows, neither of which is ancient, and they are the subject of an agreement of the same date and to the same effect as the last-mentioned agreement, but made between Joseph Smith and Mrs. Crunden and others, owners of the adjoining premises on the west side. The

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defendant objects to complete the purchase, alleging that the rights which exist in the adjoining owners, by reason of these agreements, constitute a material misdescription of the premises, of such a character as to relieve the defendant from his obligations under the contract for sale. The fact that none of the five windows in question (three in the east wall and two in the west wall) are ancient would not alone be an objection to title, or description, in the absence of any express representation or warranty on the subject. In *Greenhalgh* v. *Brindley* (1) Farwell J. said: "A contract for the sale of a house with windows looking over the land of a third person implies no representation or warranty that the windows are entitled to the access of light over that land." In my opinion this accurately states the law.

It was then urged that the agreements would be binding upon the defendant if he were to complete his purchase, as he now has notice of them, and that he would be prejudiced thereby. In my opinion the agreements will only be binding upon the defendant in this sense, and to this extent, that so long as he enjoys unobstructed the access of light through the five windows in question under, and by virtue of, the agreements it will be enjoyed by consent or agreement expressly made or given for that purpose by writing, within s. 3 of the Prescription Act, and the period for acquiring a statutory right to light will not have begun to run. In no other sense will the agreements be binding upon the purchaser. The agreements contain provisions that during the continuance thereof the windows shall at all times be kept glazed with opaque glass; and that after receipt of notice determining the licence Joseph Smith, his heirs or assigns, will remove the windows and fill up the openings with like material as the wall, that is, with brick. These agreements to do something on the land involving the expenditure of money will not be binding on the purchaser: *Haywood* v. *Brunswick Permanent Benefit Building Society* (2); *Austerberry* v. *Oldham Corporation.* (3)

It was also contended that another clause in the agreements

(1) [1901] 2 Ch. 324, 328. (2) 8 Q. B. D. 403.
(3) 29 Ch. D. 750.

would remain in force and bind the purchaser after conveyance, namely, the clause that the grantors of the licence, and all persons deriving title under them, might at any time thereafter at the expense of Joseph Smith, his heirs or assigns, enter upon the premises, remove the windows, and fill up the openings, in default of Smith doing so. In my opinion this clause is a mere licence, passing no interest, and not binding upon the purchaser after conveyance: *Thomas* v. *Sorrell* (1); *Wallis* v. *Harrison*. (2) If it amounted to an easement, which in my judgment it does not, it would be void under the rule against perpetuities: Lewis on Perpetuities, pp. 619 and 620: *London and South Western Ry. Co.* v. *Gomm*. (3)

The purchaser may, after conveyance, determine the agreement by giving notice to the adjoining owners that he will not be bound by its provisions, and after that date he may commence to enjoy the access of light as of right, and not by consent or agreement. The case of *Bewley* v. *Atkinson* (4) is important on this point. The short facts were that when Kirkbride in 1814 put out four new windows he signed a document that they were put out and remained upon the leave of Spencer, his adjoining neighbour, and that he would upon the request of Spencer at any time thereafter block up the same, and in the meantime, and until such request, would pay sixpence a year. The rent was paid down to 1859. In 1865 the plaintiff's predecessor bought Kirkbride's house, with notice of the document. In 1877 Spencer's successor required the windows to be blocked up, and in default of this being done built on his own land a wall obstructing the access of light to the windows. The plaintiff brought the action to obtain a mandatory injunction to have the wall pulled down, but the action was dismissed by Hall V.-C. and by the Court of Appeal. The Vice-Chancellor held that the document was binding upon Kirkbride's alienee, but that it might be brought to an end by a refusal to pay rent, by a refusal to perform the obligation, and otherwise. I understand the Vice-Chancellor to mean that the agreement was binding on Kirkbride's alienee in the sense that so long as he enjoyed the access of light

(1) Vaugh. 351.
(2) 4 M. & W. 538.
(3) 20 Ch. D. 562.
(4) 13 Ch. D. 283.

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under the agreement there was a consent or agreement which would prevent the statutory easement from being acquired. The Vice-Chancellor did not mean that the agreement was binding on the alienee in the sense that he could have been compelled to pay the rent of sixpence, or to block up his own windows; on the contrary, he treats the refusal by the alienee to pay the rent, or to perform the obligation, as terminating the agreement, and thereby enabling the adjoining owner, if he pleases, to obstruct the light, but not as giving the adjoining owner any cause of action against the alienee for the rent, or for the breach of the agreement. The same opinion is expressed by the Court of Appeal. James L.J. (1) pointed out that a simple agreement such as he suggested would be binding in equity on the owner of the house with the new windows, and upon all persons who took the ownership of that estate with notice. But he then proceeds to point out the sense in which alone such an agreement would be binding on a new owner of the estate. He could not claim an indefeasible right to light while enjoying it only under the agreement, with the equitable obligation to block up when called upon. James L.J. did not, in my opinion, mean that the equitable obligation to block up was one which a Court of Equity would enforce against a new owner of the estate, but only that in such circumstances the new owner had no cause of complaint when his neighbour obstructed the light, and this upon the ground that the new owner had not, under the circumstances, acquired any easement of light. In *Greenhalgh* v. *Brindley* (2) Farwell J. also points out that a purchaser may put an end to an agreement about windows by repudiating it, and refusing to enjoy any light by virtue of it; upon his so doing the twenty years under s. 3 of the Prescription Act will begin to run.

It was then urged by the defendant that the position of a purchaser with regard to these windows would be one of some doubt, and that the title ought not to be forced upon him, but the rule of the Court is that enunciated by James L.J. when delivering the judgment of the Court of Appeal in *Alexander* v. *Mills* (3):

(1) 13 Ch. D. 293. (2) [1901] 2 Ch. 327.
(3) L. R. 6 Ch. 124, 131.

"As a general and almost universal rule, the Court is bound as much between vendor and purchaser, as in every other case, to ascertain and determine as it best may what the law is, and to take that to be the law which it has so ascertained and determined." In my opinion the position of the purchaser after completion with regard to these five new windows will not be one of any doubt. These are not ancient lights, and the twenty years will not begin to run so long as the purchaser enjoys the light under the agreement; but he may repudiate the agreement, or his neighbour may determine it, in which case the right to obstruct the light will arise; but the purchaser cannot be compelled to block up the windows, or to glaze with opaque glass, or to do any other act occasioning any expenditure of money; nor can the purchaser be prevented from keeping open these windows, or opening any new ones, subject only to the right of his neighbour to obstruct the light to any windows not ancient.

In my opinion the appeal should be allowed, and judgment given for specific performance.

PICKFORD L.J. This was an action for specific performance in which the purchaser objected to accept the vendor's title because of two agreements which he had made with regard to some windows in the premises agreed to be sold. [The Lord Justice stated briefly the agreements set out above.]

No notice of these agreements was given to the defendant, who was the purchaser, and he objected to the plaintiffs' title because of them. It was admitted that the light through the windows was material to the premises. I do not think that the defendant's objection is good. I think that the general proposition as to the representation made by a vendor who sells a house with windows was correctly laid down by Farwell J. in *Greenhalgh* v. *Brindley* (1): "A contract for the sale of a house with windows looking over the land of a third person implies no representation or warranty that the windows are entitled to the access of light over that land"; and he held that an agreement by which the vendor in that case held the right of light by the licence of the corporation of Stockport did not afford ground

(1) [1901] 2 Ch. 328.

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for a valid objection to the title. In this case the only difference is that there is, in addition to the agreement for a licence, an agreement by which the vendors' predecessor in title agreed to do certain work in any case, namely, glaze the windows and keep them glazed with opaque glass, and certain other work if called upon, that is, to remove the windows and make good the wall, and also that in default of his doing the latter work the adjoining owners might enter and do it at his expense. These are agreements which, in my opinion, would not bind the purchaser within the principle of *Tulk* v. *Moxhay* (1), as they were positive agreements involving the spending of money. There was a negative agreement that the windows should not open outwards, but without any such agreement there would be no right to open windows so as to project over another person's ground.

The defendant relied upon the case of *Bewley* v. *Atkinson* (2) as supporting his contention that the purchaser would be bound by the agreement to glaze with opaque glass and to remove the windows. The decision does not establish any such proposition, but there are expressions in the judgments which, read by themselves, seem to support it. I am not clear that the learned judges had the point present to their minds and did intend to support any such proposition; if they did, the remarks were obiter only, and we are not bound by them.

I think the appeal should be allowed, and judgment given for specific performance.

Solicitors: *Light & Fulton, for W. E. Kersey, Ipswich*; *Routh, Stacey & Castle, for E. M. Marx & Colbourne, Brighton.*

(1) 2 Ph. 774. (2) 13 Ch. D. 283.

J. R. B.

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July 28, 31.

In re GRIGGS.
Ex parte SCHOOL BOARD FOR LONDON.

[1886 G. 322.]

Costs—Compulsory taking of Land—Payment of Purchase-money into Court—Application for Payment out—Letters of Administration—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 80—*Heir-at-Law—Vesting of Property.*

Freehold property was purchased by the predecessors of the London County Council under their compulsory powers and the purchase-money was paid into Court. On the death of the tenant for life it became necessary to procure administration to two of her sons, and, in the case of one of them who disappeared in 1883, an order giving liberty to swear his death. In July, 1913, an order was made dividing up the fund and one-sixth was made payable to each of these administrators:—

Held, affirming the decision of Astbury J., that the London County Council must pay the costs of obtaining the letters of administration in both cases and of the order giving leave to presume the death.

In re Lloyd and North London Railway (City Branch) Act, 1861 [1896] 2 Ch. 397, approved.

Until a legal personal representative is appointed freehold property vests in the heir.

Appeal from a decision of Astbury J.

In this case certain land was settled by the will of a testator who died in 1852, on Mrs. English for life, with remainder to her children as tenants in common in fee. During the life of Mrs. English a part of the land was taken by the London School Board in exercise of their compulsory powers under the Lands Clauses Act; the purchase-money was paid into Court and invested in 847*l.* Consols. Mrs. English died in 1911, having had six children. On a summons taken out by two daughters who survived her, an order was made that the fund in Court should be divided into sixths, and one-sixth paid to each of the applicants; one-sixth to the legal personal representatives of each of two sons who had died in Mrs. English's lifetime and to whose estates administration had been taken out before her death; one-sixth to the legal personal representatives when constituted of Henry, a son who had disappeared in 1883; and the remaining one-sixth to the legal personal representatives of another son,

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Walter, who had died in Mrs. English's lifetime, but to whose estate administration had not been taken out till after her death; and the London County Council, as successors of the London School Board, were ordered to pay costs according to the Act. On taxation the applicants claimed, and the taxing Master disallowed, costs of taking out administration to Henry and Walter, and costs of an application to the Probate Division for leave to presume Henry's death. The applicants took out a summons to review the taxation by allowing these items.

Astbury J. held that as to the costs of taking out administration, the case was covered by the decision of Stirling J. in *In re Lloyd and the North London Railway (City Branch) Act*, 1861 (1); and that the application to the Probate Division was necessary for and antecedent to obtaining the grant of administration and must be allowed as part of the costs thereof.

The London County Council appealed.

Jenkins, K.C., and *Owen Thompson*, for the appellants. The London County Council ought not to be ordered to pay the costs of taking out administration to the estates of Henry and Walter, nor of the order presuming the death of the former. They are not covered by the words in s. 80 (2) of the Lands

(1) [1896] 2 Ch. 397.

(2) 8 & 9 Vict. c. 18, s. 80: "In all cases of monies deposited in the bank under the provisions of this or the special Act, or an Act incorporated therewith, except where such monies shall have been so deposited by reason of the wilful refusal of any party entitled thereto to receive the same, or to convey or release the lands in respect whereof the same shall be payable, or by reason of the wilful neglect of any party to make out a good title to the land required, it shall be lawful for the Court of Chancery in England or the Court of Exchequer in Ireland to order the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters of the undertaking; (that is to say), the costs of the purchase or taking of the lands, or which shall have been incurred in consequence thereof, other than such costs as are herein otherwise provided for, and the costs of the investment of such monies in Government or real securities, and of the reinvestment thereof in the purchase of other lands, and also the costs of obtaining the proper orders for any of the purposes aforesaid, and of the orders for the payment of the dividends and interest of the securities upon which such monies shall be invested, and for the payment out of Court of the principal of such monies, or of the securities whereon the same shall be

Clauses Act, 1845, "charges and expenses incident thereto." They are not costs of obtaining the order or of proceedings relating thereto. These orders were not made necessary by anything we have done. Administration must have been taken out before the beneficiaries could get their money, whether we had taken the land or not: Williams on Executors, 10th ed. p. 233. Under the Land Transfer Act, 1897, administration has to be obtained although the property is freehold. It no longer vests in the heir. But that ought not to impose any further burden on us. In order to fix us with these costs it must be shewn that they would not have been incurred if we had not taken the land. The legal estate is not in the heir at first where there is an intestacy: *Hewson* v. *Shelley.* (1) It is said that the practice on this point has been settled by Stirling J. in *In re Lloyd and North London Railway (City Branch) Act,* 1861 (2); but that decision is not binding on this Court and it was erroneous. His Lordship followed two Irish decisions, *Ex parte Kelly* (3) and *Ex parte Rorke* (4), but his decision was distinguished in *In re Elementary Education Acts,* 1870 *and* 1873 (5), although that case turned on s. 82 of the Lands Clauses Act. It was approved in *In re London United Tramways Act,* 1900 (6), which was also under s. 82, and in *In re Thames Tunnel (Rotherhithe and Ratcliff) Act,* 1900. (7) That case again was under s. 82, and the expressions used in the judgments on this point are merely dicta. At all events s. 80 does not say that the Court is obliged to order the undertakers to pay such costs.

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invested, and of all proceedings relating thereto, except such as are occasioned by litigation between adverse claimants: Provided always, that the costs of one application only for reinvestment in land shall be allowed, unless it shall appear to the Court of Chancery in England or the Court of Exchequer in Ireland that it is for the benefit of the parties interested in the said monies that the same should be invested in the purchase of lands, in different sums and at different times, in which case it shall be lawful for the Court, if it think fit, to order the costs of any such investments to be paid by the promoters of the undertaking."

(1) [1914] 2 Ch. 13.
(2) [1896] 2 Ch. 397.
(3) (1893) 31 L. R. Ir. 137.
(4) [1894] 1 I. R. 146.
(5) [1909] 1 Ch. 55.
(6) [1906] 1 Ch. 534.
(7) [1908] 1 Ch. 493.

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[SWINFEN EADY L.J. referred to *In re Liverpool Improvement Act.* (1)]

Hon. Frank Russell, K.C., and *H. C. Bischoff*, for the respondents. The practice on this point has been settled ever since the decision in *In re Lloyd and North London Railway (City Branch) Act*, 1861 (2), which has never been dissented from, and was expressly approved in *In re Thames Tunnel (Rotherhithe and Ratcliff) Act*, 1900. (3) The Court is asked to read s. 80 as if it contained a proviso that the undertakers were to pay no costs except those caused by their taking the land. That is not in accordance with the section, which is wide enough to cover these costs. It is no answer to say that the costs of administration would have had to be incurred in any event. The legal estate is in the heir till a personal representative is appointed: *John* v. *John* (4); Brickdale and Sheldon's Land Transfer Acts, 2nd ed. p. 257.

Jenkins, K.C., in reply. The respondents elected to proceed through an administrator and ought to pay the costs of the order.

Cur. adv. vult.

July 31. LORD COZENS-HARDY M.R. stated the facts and continued: Astbury J. has held that the proper costs of obtaining these two letters of administration are payable by the London County Council. This is, I believe, in accordance with the settled practice. Stirling J. in a considered judgment decided the precise point in 1896 in *In re Lloyd and North London Railway (City Branch) Act*, 1861. (2) He followed the decision of the Irish Court in 1893 in *Ex parte Kelly*. (5) *In re Lloyd and North London Railway (City Branch) Act*, 1861 (2), was approved in this Court in 1908 in *In re Thames Tunnel (Rotherhithe and Ratcliff) Act*, 1900 (3), by Buckley L.J. and also, though perhaps not so clearly, by Fletcher Moulton L.J. So far as I am aware it has never been questioned. I think we ought to hesitate long before we upset this settled practice. But as the decision in

(1) (1868) L. R. 5 Eq. 282.
(2) [1896] 2 Ch. 397.
(3) [1908] 1 Ch. 493.
(4) [1898] 2 Ch. 573, 576.
(5) 31 L. R. Ir. 137.

In re Lloyd and North London Railway (City Branch) Act, 1861 (1), has now been distinctly challenged, I wish to say that in my opinion it was a sound decision and ought to be followed. The language of s. 80 is very wide, much wider than the language of s. 82. The parliamentary undertakers are allowed the privilege of acquiring land and paying the purchase-money into Court upon submitting to the onerous terms of s. 80. Fletcher Moulton L.J. said in *In re Thames Tunnel (Rotherhithe and Ratcliff) Act*, 1900 (2), after pointing out the distinction between s. 82, which was the section which had directly to be dealt with in that case, and s. 80: "If the purchasing body is doubtful to whom the money representing the compensation should be paid, it has the right to pay it into Court and to leave the parties entitled to it to make good their claims before the Court. But if it avails itself of this procedure, it does so on the terms of bearing all the costs of the legal steps necessary to be taken by the claimants in order to get the money paid to them. These expenses are not conveyancing expenses at all, and have nothing to do with the provisions of s. 82. They are expenses of the distribution of the purchase-money, and not of the conveyance of the land. In all the four cases which I have named the items were of this kind, and were allowed expressly under the provisions of s. 80." He does not indicate a particle of doubt as to the accuracy of those cases. Buckley L.J. goes further and says (3) distinctly that he concurs with Stirling J.'s decision in *In re Lloyd and North London Railway (City Branch) Act*, 1861 (1), and in the Irish cases which he followed. It is quite true that what was said in *In re Thames Tunnel (Rotherhithe and Ratcliff) Act*, 1900 (2), was mere dictum, because the question did not directly arise, but I think it adds weight to the view I have taken; and in *In re Thames Tunnel (Rotherhithe and Ratcliff) Act*, 1900 (2), I certainly did not express any different opinion; what I said was this (4): "I do not think it necessary to consider the cases which have arisen under s. 80, the language of which is much wider than the language of s. 82."

(1) [1896] 2 Ch. 397.
(2) [1908] 1 Ch. 493, 506.
(3) [1908] 1 Ch. 512.
(4) Ibid. 500.

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When this land was taken in 1886 it was freehold. The legal personal representative of the freeholder had nothing to do with it. This was true up to 1897. Before that date the son who was last heard of in 1883 must be presumed to have died, and his heir was entitled. The other son died in 1901, and this observation does not apply to him.

It was argued by counsel that since 1897 it is an offence to abstain from taking out administration, and that the heir could not therefore have entered into possession. I am not pressed with this argument; until there is a personal representative the property vests in the heir. He could recover the rents and maintain actions for trespass. He may not be the proper person to apply for administration. He is the sole beneficiary. Both the administrations were applied for and obtained for the purpose of completing the distribution of the fund. In my opinion Astbury J.'s decision was perfectly right, and this appeal must be dismissed with costs.

SWINFEN EADY L.J. stated the facts and proceeded: The fund could not have been paid out of Court without these grants of administration being obtained, and both these grants were obtained expressly for that purpose. The question is whether the county council are liable to pay the costs under the 80th section of the Lands Clauses Consolidation Act. That section is expressed in wide terms. It provides not only for the costs of the matters therein referred to, but also for "all reasonable charges and expenses incident thereto," and extends to and includes the cost of obtaining the orders for the payment out of Court of the principal moneys and of all proceedings relating thereto. It was held by Stirling J. in *In re Lloyd and North London Railway (City Branch) Act*, 1861 (1), in a reserved judgment, that the costs of letters of administration taken out to the beneficiaries in order to obtain payment out of Court of money paid in under the Lands Clauses Consolidation Act must be paid by the company. In so holding he followed two decisions of the Irish Courts, *Ex parte Kelly* (2) and *Ex parte Rorke* (3),

(1) [1896] 2 Ch. 397. (2) 31 L. R. Ir. 137.
(3) [1894] 1 I. R. 146.

which in turn were founded on previous cases decided in England; and Stirling J. also pointed out that it was very desirable that the practice should be the same in both countries. This decision of Stirling J. has since been followed in Ireland.

In my opinion, the decision of Stirling J. was right, as also was the decision of Astbury J. in the present case. The costs and charges of obtaining the administrations were incident to obtaining payment; and obtaining the grants of administration were proceedings relating thereto. The decision of Stirling J. was approved in the Court of Appeal in *In re Thames Tunnel (Rotherhithe and Ratcliff) Act*, 1900 (1), both by Fletcher Moulton L.J. and Buckley L.J., the former pointing out that promoters of an undertaking paying purchase-money into Court do so on the terms of bearing all the costs of the legal steps necessary to be taken by the claimants in order to get the money paid to them. They are expenses of the distribution of the purchase-money. The practice has thus been settled by a long course of decisions and is not now open to question; and it is in accordance with what, in my judgment, is the true construction of the 80th section of the Lands Clauses Consolidation Act 1845. It was urged that these grants of administration would not have been necessary if only four of the six shares had been paid out of Court and the other two shares carried over to separate accounts with liberty to apply. This course, however, would not have prevented these costs being incurred or the question from arising for decision, although it might have postponed it for a time. Moreover, such a course would not have been a proper one. On applications to deal with funds paid in under the Lands Clauses Consolidation Act and immediately divisible among beneficiaries it is the duty of the applicant to apply for the distribution of the entire fund, and not merely for payment out of his own share. This course is also a saving of expense with regard to the promoters, who ought not to have to pay the costs of several applications to the Court when the whole fund might have been distributed on one application and by one order. In my opinion the appeal fails and should be dismissed.

(1) [1908] 1 Ch. 493.

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PICKFORD L.J. I think this appeal should be dismissed. It is admitted that the point is covered by the decision of Stirling J. in *In re Lloyd and North London Railway (City Branch) Act*, 1861 (1), and this appeal is really against that decision. The learned judge in that case followed two Irish decisions, and since that date the practice in both countries has been governed by it. The case has often been cited and has never been disapproved, and in *In re London United Tramways Act*, 1900 (2), it was referred to by Swinfen Eady L.J., then a judge of first instance, as one of the cases settling the construction of the Act too well to be open to question.

Again the case was referred to in *In re Thames Tunnel (Rotherhithe and Ratcliff) Act*, 1900 (3), in the Court of Appeal. It was expressly approved by Fletcher Moulton L.J. and Buckley L.J., and was referred to by the Master of the Rolls without any expression of disapproval. It is true that the point argued before us was not before the Court of Appeal in that case, but unless there are strong grounds for doing so I do not think we should interfere with a decision given so many years ago and approved when it has been cited to the Courts and acted upon as governing the practice under the Act. There is nothing in the arguments on behalf of the appellants which seems to me to afford sufficient ground for doing so. On the contrary, I think the decision was right.

Solicitors: *Edward Tanner; Simpson, Palmer & Winder.*

(1) [1896] 2 Ch. 397. (2) [1906] 1 Ch. 534.
(3) [1908] 1 Ch. 493.

H. C. R.

MAYNER *v.* PAYNE.

NEVILLE J.

[1913 M. 2370.]

1914

June 24, 25, 26.

Vendor and Purchaser—Building Scheme—Restrictive Stipulations—Power reserved to "Vendor" to vary Stipulations—Sale subject to Stipulations—Sub-sales subject to Stipulations—"Vendor"—Release of Stipulations by original Vendor—Rights of Purchasers and Sub-purchasers.

W., the owner of an estate, laid it out for building subject to seventeen stipulations, of which the eighth provided that the houses to be erected on the estate should be of uniform elevation in accordance with drawings to be approved by "the vendor's" surveyor; the eleventh provided that no trade or business of any kind should be carried on upon any lot except those marked "shop lots"; and the sixteenth reserved to "the vendor" the right of allowing a departure from the stipulations in any one or more cases.

In 1895 W. sold and conveyed several lots of the estate (none of which were "shop lots") to the plaintiff subject to seventeen scheduled stipulations, which were identical with the original stipulations, and the plaintiff covenanted to perform and observe the scheduled stipulations. In 1898 the plaintiff sold and conveyed six of the lots he had purchased to G. subject to seventeen stipulations scheduled to G.'s conveyance, which were identical with the original stipulations, and G. covenanted to observe and perform the scheduled stipulations. In 1910 G.'s successors in title sold and conveyed one of the six lots to the predecessors in title of P. subject to the stipulations scheduled to the deeds of 1895 and 1898 so far as then subsisting.

W. was a party to the deed of 1910, and for valuable consideration released the lot thereby conveyed from the eighth stipulation with liberty to build on it as if it were a "shop lot," and in 1913 this lot was sold and conveyed to P., who, with W.'s approval, built a motor garage upon it and his tenant commenced to carry on business there. In an action by the plaintiff against P. and his tenant, alleging that the word "vendor" in the stipulations scheduled to the conveyance of 1898 meant the plaintiff and not W., that the defendants had without his (the plaintiff's) consent committed a breach of the eighth and eleventh stipulations, and claiming an injunction:—

Held, that the word "vendor" in the stipulations scheduled to the conveyance of 1898 meant W. and not the plaintiff; and that, W. having under the sixteenth stipulation released the defendants' land from the eleventh stipulation, the plaintiff had no cause of action.

WITNESS ACTION.

In 1889 one Webb, the owner of a freehold building estate at Bexhill-on-Sea, known as the Egerton estate, put it up for sale

NEVILLE J. in lots by public auction subject to restrictive stipulations. All the lots were not sold at the auction.

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By deed dated October 17, 1895, Webb and his mortgagees, in consideration of 2133*l.*, sold and conveyed to the plaintiff in fee simple (inter alia) six pieces of land forming part of the Egerton estate and being the lots coloured pink in the plan drawn on the deed and therein numbered 753 to 758, both inclusive, subject nevertheless to the stipulations set forth in the second schedule thereto. This deed, without defining the words "vendor" or "purchaser," contained the following covenant:—"And the vendor as to so much of the land adjoining the land hereby conveyed as remains vested in him and the purchaser as to the land hereby conveyed hereby covenant with and to each other and as regards the purchaser also with and to the owner or owners of any land to which the said stipulations relate other than the land hereby conveyed or remaining vested in the vendor that the covenantors respectively and their respective heirs and assigns will henceforth observe perform and comply with the said stipulations so far as the same relate either to the rights or to the duties of the purchaser his heirs or assigns in respect of the land hereby conveyed and that nothing shall ever be erected fixed or done upon the land as to which they respectively covenant or any part thereof in breach or violation or contrary to the fair meaning of the said stipulations, but this covenant is not to be held personally binding upon either the vendor or the purchaser or any other person except in respect of the breaches committed or continued during his her or their joint or sole seisin of or title to the land upon or in respect of which such breach shall have been committed."

The stipulations set forth in the second schedule to this deed were seventeen in number and were identical with the stipulations used at Webb's auction sales of the estate and, so far as material to this case, were as follows:—

"5. Maintenance of roads.—The vendor has formed the roads and pathways on the estate and every owner of a lot and his tenants shall at all times have free use of the same provided always that until the public authorities shall take upon themselves the repairs thereof the owner of each lot shall pay to the vendor his

proportion of any repairs or costs of maintenance thereof and the expenses connected therewith which may be performed or incurred by him such proportion to be adjusted by the vendor's surveyor with reference to the frontages of the lots."

"8. Elevation of buildings.—The houses to be erected upon the estate are each to be of uniform elevation in accordance with the drawings to be prepared or approved by the vendor's surveyor . . . ."

"11. Shops.—No trade business or manufacture of any kind is to be carried on upon any of the lots now offered except those marked 'shop lots.'"

"13. Buildings.—On no lot shall more than one house be built, nor until a house be built shall any domestic office stable or stable office or other inferior permanent building be erected."

"15. Prohibitions.—No lot nor any house or building erected thereon shall be used for any noisy or offensive trade or for any purpose which may be a nuisance or annoyance to the vendor his successors or assigns or to the neighbourhood.

"16. Rights reserved.—The vendor reserves the right of allowing a departure from these stipulations in any one or more cases.

"17. Mutual covenants.—The conveyance to each purchaser shall contain a mutual covenant by the vendor and purchaser with each other and with the owner of all the lots now offered to observe the above stipulations and a proviso limiting the personal liability to the period of ownership."

None of the lots conveyed by the deed of October 17, 1895, by Webb to the plaintiff were "shop lots."

By a deed dated November 8, 1898, and made between the plaintiff of the one part and G. Whitechurch of the other part, after reciting that the plaintiff was seised in fee simple of the hereditaments thereby conveyed free from incumbrances except the stipulations set forth in the schedule thereto, the plaintiff as beneficial owner in consideration of 3875*l.* conveyed a piece of land comprising the six lots numbered 753 to 758 to G. Whitechurch in fee simple subject only to the stipulations set forth in the schedule thereto. And G. Whitechurch as to the land thereby

NEVILLE J. 1914 MAYNER v. PAYNE.

conveyed covenanted with the plaintiff and also with the owner or owners of any land to which the said stipulations related other than the land thereby conveyed to observe, perform, and comply with the said stipulations so far as the same related either to the rights or to the duties of G. Whitechurch, his heirs or assigns, in respect of the land thereby conveyed, and that nothing should ever be erected, fixed, placed, or done upon the land thereby conveyed or any part thereof in breach or violation or contrary to the fair meaning of the said stipulations, but this covenant was not to be personally binding upon G. Whitechurch or any other person except in respect of the breaches committed or continued during his, her, or their joint or sole seisin of or title to the land upon or in respect of which such breaches should have been committed.

This deed also contained no definition of the words "vendor" or "purchaser," and the stipulations in the schedule thereto were identical with the seventeen stipulations in the second schedule to the deed of October 17, 1895.

In 1908 G. Whitechurch died.

By deed dated August 17, 1910, and made between the executors of G. Whitechurch (therein called the vendors) of the first part, two persons (therein called the purchasers) of the second part, Webb of the third part, and three other persons (therein called the sub-purchasers) of the fourth part, the vendors in consideration of 650*l.* conveyed a piece of land being the said lot numbered 753 comprised in the said deed of November 8, 1898, to the sub-purchasers in fee simple subject to the stipulations set forth in the second schedule to the deed of October 17, 1895, and again set forth in the schedule to the deed of November 8, 1898, so far as the said stipulations might be then still subsisting and affected the hereditaments thereby conveyed. And Webb, in consideration of 50*l.* paid to him, thereby agreed and consented that the sub-purchasers and the survivor of them, their heirs and assigns, should, notwithstanding anything in the aforesaid stipulations contained, be at liberty to erect a church upon the land thereby assured or, if the land were not required for that purpose (which happened), to erect thereon shop buildings or other premises and to use the said land as if the

same had been marked "shop lots" in the plan on the deed of October 17, 1895, provided that the agreement and consent of Webb thereinbefore contained should not be construed as authorizing the said piece of land or any part thereof or any building erected thereon to be used for the purpose (amongst other things) of any noisy, noisome, or offensive trade or for any purpose which might be a nuisance or annoyance to Webb, his heirs or assigns, or to the neighbourhood.

This deed contained no covenant either by the purchasers or the sub-purchasers to perform and observe the stipulations in the schedules to the deeds of October 17, 1895, or November 8, 1898, or to indemnify against any breach thereof.

Two of the said sub-purchasers eventually became the immediate predecessors in title of the defendant Payne, and by a deed dated February 27, 1913, they as beneficial owners and in consideration of 850*l.* conveyed to him in fee simple lot 753 subject to the stipulations in the schedule to the deed of November 8, 1898, and with the benefit of the covenants and stipulations in the deed of August 17, 1910, and the defendant Payne covenanted to perform and observe the said stipulations and to indemnify.

In April, 1913, the defendant Payne commenced to build and in the following June completed the erection of a motor garage on lot 753, and by deed dated July 19, 1913, demised the same for a term of years to the defendant Grime, who commenced to carry on the business of a motor garage proprietor.

The plaintiff commenced this action in September, 1913, and by his statement of claim alleged that the erection of the motor garage was a breach of the stipulations and covenants in the deed of November 8, 1898, and that his approval was not sought or obtained as provided by the eighth stipulation; that the carrying on of the business of a motor garage proprietor on lot 753 was a breach of the said stipulations and was a noisy and offensive trade and a nuisance and annoyance to the plaintiff as vendor and owner of the lands comprised in the deed of November 8, 1898, and to the neighbourhood; and he claimed (1.) declaration that the defendants were not entitled to use the land conveyed by the deed of November 8, 1898, or any part

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thereof in breach of the stipulations and covenants therein contained without his consent, (2.) an injunction restraining the defendants from carrying on the business of a motor garage proprietor upon (in effect) lot 753, and (3.) a mandatory injunction to pull down the garage.

The defendant Payne by his defence relied on the sixteenth stipulation in the schedule to the deed of October 17, 1895, and submitted that the covenant by G. Whitechurch with the plaintiff to observe and perform the stipulations contained in the deed of November 8, 1898, was merely a covenant to indemnify the plaintiff in respect of any breach of the said stipulations in relation to the land thereby conveyed against any claim by Webb or the owner or owners of any other land to which the said stipulations related in respect of such breach; he alleged that the word "vendor" wherever used in the said stipulations contained in the deed of November 8, 1898, and in particular the fifth, eighth, and sixteenth stipulations, meant Webb and not the plaintiff; he referred to the deed of August 17, 1910, and denied that the erection of the garage was a breach of any stipulation or covenant in the deed of November 8, 1898; he alleged (as the fact was) that the plans for the garage were submitted to and approved of by Webb before the erection thereof, and that the business of a motor garage proprietor carried on upon the same premises by the defendant Grime was authorized by the consent of Webb contained in the deed of August 17, 1910, and he denied that such business was noisy or offensive or any annoyance to the plaintiff and to the neighbourhood; and he further alleged that the stipulations contained in the deed of October 17, 1895, and repeated in the deed of November 8, 1898, were made in accordance with a building scheme, and that since November 8, 1898, there had been such a change in the general character of the neighbourhood that the object of the eleventh stipulation had disappeared.

The defence of the defendant Grime was to the same effect.

Evidence was given on behalf of the plaintiff as to the alleged noise and nuisance in carrying on the business at the garage, but the case was decided on the preliminary point mentioned below. Mr. Webb, who was called on behalf of the defendants,

stated that when the plans for the garage were first submitted to him he said he did not object if the adjoining owners did not object, but that he afterwards gave his unqualified assent to the erection of the garage; and that he still authorized it and consented to the business carried on there.

Peterson, K.C., and *Hon. H. Fletcher Moulton*, for the plaintiff. There was here a building scheme over a defined area, the Egerton Park estate, and the benefit of the restrictive stipulations runs with the land. There are two classes of cases in which restrictive covenants are not enforced. One is where the covenant is personal to the vendor, i.e., where no land is retained to which the benefit of the covenant can attach: *Tulk* v. *Moxhay* (1); *Renals* v. *Cowlishaw* (2); *Formby* v. *Barker* (3); *Osborne* v. *Bradley* (4); *Elliston* v. *Reacher* (5); *Millbourn* v. *Lyons* (6); *London County Council* v. *Allen*. (7) The other is where there is a total change in the character of the locality: *German* v. *Chapman* (8); *Sayers* v. *Collyer* (9); *Knight* v. *Simmonds* (10); *Sobey* v. *Sainsbury*. (11) The essentials of a building scheme are stated in *Reid* v. *Bickerstaff* (12), and there is no case which suggests that where the original vendor retains land with a restrictive covenant he is unable to enforce the covenant as against a purchaser who has entered into the restrictive covenant with him simply because there is no reference to any land retained. The plaintiff is still the owner of some lots near to the garage. He is therefore entitled to the benefit of the covenants, and there is no such change in the character of the neighbourhood as debars him from suing. The covenant in the deed of 1895 clearly establishes a building scheme between Webb and Mayner as to the Egerton Park estate, and "the vendor" in that deed means Webb. Then the covenants in the conveyance of 1898 between Mayner and Whitechurch clearly relate

(1) (1848) 2 Ph. 774.
(2) (1878) 9 Ch. D. 125; on appeal (1879) 11 Ch. D. 866.
(3) [1903] 2 Ch. 539.
(4) [1903] 2 Ch. 446.
(5) [1908] 2 Ch. 665.
(6) [1914] 1 Ch. 34.
(7) [1914] W. N. 255.
(8) (1877) 7 Ch. D. 271.
(9) (1884) 28 Ch. D. 103.
(10) [1896] 2 Ch. 294.
(11) [1913] 2 Ch. 513.
(12) [1909] 2 Ch. 305.

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to part of the same estate and the schedule refers to "the vendor"; and the question is, who is the vendor for the purposes of that deed? It is submitted that there is no ambiguity, and that "the vendor" is the person who is selling and conveying, that is, Mayner. But if there is no ambiguity, you can look at the surrounding circumstances to construe the deed; that lets in the contract between Mayner and Whitechurch, which shews conclusively that Mayner is the vendor.

[NEVILLE J. I do not agree that you can look at the contract to construe the deed. You can look at surrounding circumstances, but the contract is absorbed in the deed. The only cases where you look at the contract are where you are seeking to rectify the deed.]

In any event there is a new and separate covenant by Whitechurch with Mayner to observe the scheduled stipulations and that nothing shall be erected on the land in breach of the stipulations. The defendants have broken the eighth, eleventh, and fifteenth stipulations. The defendants plead that their land was released by Webb from the eleventh stipulation. Assuming that "vendor" in the deed of 1898 means Webb and not Mayner, that throws us back to the deed of 1895, and to the sixteenth stipulation in the schedule to that deed, and it is submitted that the power to vary the stipulations reserved to Webb by that deed only applies to the land retained by Webb and not to the land conveyed to Mayner, and that Webb, as against Mayner, is not entitled to release any part of Mayner's land from rights in favour of a sub-purchaser of Mayner and so affect Mayner's other lands. Therefore the release by Webb in the deed of 1910 is ineffectual as against Mayner.

Jenkins, K.C., and *E. E. Brydges*, for the defendant Payne. The garage is not in my occupation, and if my tenant carries on a noisy business I am not responsible. What is the plaintiff's case against me? He says that Whitechurch, my predecessor in title, in his conveyance of 1898 from Mayner attached to my land de novo certain restrictive covenants so that the benefit of them runs with the land retained by Mayner and entitles him as vendor to sue me. What is the construction of that deed? It recites that Mayner is the owner in fee "subject to the stipulations in the schedule," and then he conveys subject to

those stipulations. It is obvious, therefore, that Mayner is not "the vendor" referred to in the schedule, and looking at the earlier document of title, the deed of October, 1895, it is clear that the stipulations in the two deeds are identical and that "the vendor" is Webb and not Mayner. This is also evident from the fifth stipulation relating to roads, because it was Webb and not Mayner who laid out and made up the roads on the estate. It is true that Whitechurch entered into a covenant with Mayner, but it was not a restrictive or new covenant, but a positive covenant to perform and observe the same stipulations that were binding on Mayner, and was only equivalent to a covenant to indemnify Mayner: *Harris* v. *Boots, Cash Chemists (Southern)* (1); *In re Poole and Clarke's Contract.* (2) The covenant in effect is not to do something without the consent of Webb, and if we obtain his consent there is no breach of the covenant.

[NEVILLE J. It seems to me that there is a preliminary question upon the decision of which the whole case turns. Mr. Peterson has directed his argument to it, and it is this. Assuming everything in favour of the plaintiff in regard to his right to sue and his remedy against the land, the question arises, what is the obligation that the owner of the land is bound to fulfil? In the conveyance of 1898 the defendant Payne's predecessor in title has covenanted with the vendor to him that he will fulfil the stipulations contained in the schedule, and then you turn to the schedule to find out what those stipulations are. If the stipulations are to be read as meaning that the "vendor" in them is the grantor of the land to Whitechurch, then of course all the other questions arise. But if on the other hand "vendor" in those stipulations means Webb, then you have to consider what is the obligation of the covenant, and the obligation of the covenant is that the purchaser will fulfil the stipulations, reading in them Webb as the vendor. If so, the action would fail because the covenant is only to obey the restrictions subject to the licence of Webb, and the licence of Webb having been obtained there would be no breach of the covenant.]

That is the main point of our defence, and, if we are right on that point, the plaintiff has no case. But it is said that the

(1) [1904] 2 Ch. 376. (2) [1904] 2 Ch. 173.

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power to vary the stipulations applies only to the land retained by the vendor. It may, however, be general and apply both to the land retained and the land conveyed. It is mainly a question of construction. By the deed of 1910 to which my predecessors in title and Webb were parties, Webb released my land for business purposes and subsequently approved of the plans for the garage. The power to vary is an arbitrary right retained by Webb. It is part of the building scheme and such a power is valid: *Osborne* v. *Bradley* (1); *Elliston* v. *Reacher* (2); *Whitehouse* v. *Hugh.* (3)

[They were stopped.]

Rawlinson, K.C., and *R. J. A. Morrison*, for the defendant Grime, were not called upon.

Peterson, K.C., in reply.

NEVILLE J. In this case the licence was in the first instance a licence which was operative but qualified so far as the adjoining owners were concerned. Ultimately it became an absolute licence because Mr. Webb has the right to alter the stipulations and tells us that he is willing to permit the existence of this garage and the carrying on of the business. That being so, I have to consider the terms of the conveyance of November 8, 1898. [His Lordship read the deed and continued:] The question is what was the obligation under that deed in respect of the conditions set forth in the schedule thereto. The land in question had been laid out as a building estate by Mr. Webb, and I think that the best way of expressing the equitable view that is taken of the obligations of the subsequent owners of parts of an estate subject to such a plan is that adopted in *Reid* v. *Bickerstaff* (4) by the present Master of the Rolls, and I think other judges, that is to say, that it is a local law imposed by the vendor upon the holders of the land who have taken the land with notice of the existence of the local law. It is a law by which the land is bound and the rights of the landowners inter se are equal. I think, therefore, that in the present case, apart altogether from the express form of the covenant, any owner who took his conveyance with notice of the existence of the local

(1) [1903] 2 Ch. 446.
(2) [1908] 2 Ch. 374, 665.
(3) [1906] 1 Ch. 253, 261; on appeal [1906] 2 Ch. 283.
(4) [1909] 2 Ch. 305, 319.

law, or of the restrictive conditions imposed on the user of the land, would be liable in an action either by the original vendor, supposing he was still interested in the estate, or by any of the subsequent holders of the land subject to the local law. When I come to look at the precise terms of the conveyance to the defendant Payne I have to consider whether what was done renders him and the land which he took subject to the original law imposed by Mr. Webb, who was responsible for the laying out of the estate, or whether some new conditions were imposed which were applicable between him and Mayner, the person who conveyed the land to him, and which were altogether outside the terms of the local law. It seems to me after a careful study of the deed that that was not so. What was effected by the deed was that the land was conveyed subject to stipulations set forth in the schedule, which were the local law that had been imposed by the original vendor. Then comes the covenant, which was both with the person who conveyed and also with the owners of any land to which the stipulations related, other than the land thereby conveyed, to observe, perform, and comply with the said stipulations. It seems to me that it is merely a covenant to obey the law of the locality as it stood, and when we examine what that law was we find it was a law which could be varied at the option of Mr. Webb, the original vendor, who reserved by the sixteenth condition the right of allowing a departure from the stipulations in any one or more cases. I think, therefore, that in this case there has been no breach of the covenant, and consequently the question of the right of the plaintiff to sue the present defendants does not arise. Whether or not under other circumstances he might not be entitled to sue is a matter which does not arise. In this case I hold that there is no breach of the covenant with him.

I hold, therefore, that this action fails and must be dismissed with costs.

Solicitors for plaintiff: *Woodcock Ryland & Parker, for Rowley, Chatwin & Emerson, Birmingham.*

Solicitors for defendants: *Powell, Rogers & Merrick, for C. A. Pead, Bexhill.*

H. L. F.

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E. W. SAVORY, LIMITED *v.* THE WORLD OF GOLF, LIMITED.

[1914 E. 303.]

Copyright—Copyright in Picture not registered at the Commencement of the Copyright Act, 1911 — *Memorandum of Assignment* — "*Four Golfing Subjects*"—*Parol Evidence to identify—Offer before Action—Right of Plaintiff to Order—Costs—Fine Arts Copyright Act*, 1862 (25 & 26 *Vict. c.* 68), *ss.* 1, 3—*Copyright Act*, 1911 (1 & 2 *Geo.* 5, *c.* 46), *s.* 1, *sub-ss.* 1, 2; *s.* 2, *sub-s.* 1 (*iii.*); *s.* 5, *sub-ss.* 1, 2; *Sched. I.*

In the case of a picture assigned with all copyrights, but not registered under the Fine Arts Copyright Act, 1862, at the time of the commencement of the Copyright Act, 1911, the owner of the picture has such a "copyright" as will enable him to receive the substituted and enlarged copyright given to owners of copyright in substitution for their existing rights by s. 5 and Sched. I. of the Copyright Act, 1911.

The only memorandum of an assignment of copyright was a receipt for a sum paid for "Five original card designs inclusive of all copyrights. Subjects: four golfing subjects: one Teddy Bear painting":—

Held, that parol evidence was admissible to identify the designs intended, and the memorandum was sufficient within s. 3 of the Copyright Act, 1862.

A plaintiff whose copyright is infringed has a right to an order of the Court restraining the infringement, and is not prevented from exercising his rights by an offer of the infringer before action that he will promise not to do it again and will pay such damages as may be agreed upon. If such an offer is repeated after writ issued, with the addition of an offer to submit to an order and pay costs to date, the plaintiffs may be deprived of any subsequent costs.

THE plaintiffs in this action were colour printers and art publishers. On or about March 28, 1910, they purchased from W. Fletcher Thomas, an artist, five original sketches, of which one was a representation of a golf player returning from the links carrying a case filled with golf clubs slung on his right shoulder, with a dejected expression, and the words "Thirteen down. Great Scot" written below. This was published as a Christmas card and sold by the plaintiffs in the winters of 1910 and 1911.

On December 4, 1913, the defendant company, who were owners of a penny weekly periodical called the *World of Golf*,

published No. 399 of this periodical, on the back cover of which appeared an exact copy of the plaintiff's picture, with the added words "I wish I had used a Commodore Ball" printed as the central part of an advertisement of a firm of golf ball manufacturers, known as the Bubastic Company.

This advertisement was received by the manager of the defendants from the Pall Mall Advertising Agency, a firm from whom they were in the habit of receiving advertisements, together with a block for printing it from, which was returned to them after the advertisement was published. The defendants had no knowledge, or reason to suppose, that there was any copyright in the picture. On December 5 the defendants received a letter from Thomas informing them that he was the painter of the picture, and that the plaintiffs were the owners of the copyright. Upon December 6 they received a letter from the plaintiffs' solicitors complaining of the infringement and demanding (1.) an undertaking to publish an apology satisfactory to them; (2.) an undertaking to deliver up all blocks, plates, or negatives of the picture, with all copies, and to refrain from further infringement; and (3.) an undertaking to pay substantial damages and costs. On December 9 the defendants wrote to the plaintiffs offering (1.) to publish an apology; (2.) an undertaking that they held no blocks, plates, or negatives, to hand over copies, and to undertake to refrain from further infringement; and (3.) to pay their share of the plaintiffs' costs. No answer was sent to this offer, the plaintiffs afterwards giving as a reason that the infringement was still going on. On March 11, 1914, the plaintiffs issued a writ claiming an injunction, damages for the infringement, an account of profits, delivery up of all infringing copies, and costs. They alleged by their particulars that three named agents of the defendants had sold copies after the defendants knew of the plaintiffs' copyright, and that the defendants ought to have called in all the copies so held.

The defendants by their defence said that the plaintiffs had no copyright in the picture because it was not registered before the Act of 1911. They also denied that there had been any sufficient assignment of the copyright to the plaintiffs, and alleged that at the date of the alleged infringement they were not aware and

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had no reasonable ground for suspecting that there was any copyright in the work, and relied on their offer in the letter dated December 9, 1913, as offering all the relief the plaintiffs could possibly be entitled to, and alleged that the action was unnecessary and ought to be dismissed with costs. They also alleged that all copies of the number alleged to contain the infringement had been held at the plaintiffs' disposal until January 28, 1914, when they were destroyed as waste paper; and that if any copies had been sold since that offer, it had been done by persons who were not their agents and over whom they had no control.

The only memorandum in writing of the assignment of the copyright to the plaintiffs was a receipt from the artist in the following form, partly printed:—

"Received of Messrs. E. W. Savory, Limited, Bristol, the sum of two pounds six shillings and sixpence for five original card designs inclusive of all copyrights.

*Subjects: 4 golfing subjects.
1 Teddy Bear painting.
Size of canvas in. in.
(Signed) W. Fletcher Thomas.

*Give titles and short descriptions of each subject."

This receipt was duly stamped and handed to the plaintiffs.

By the evidence at the trial only one sale of the infringing number of the *World of Golf* since December 9, 1913, was proved. This was made by Simpkin, Marshall & Co., a firm of wholesale newsagents to whom copies were supplied by the defendants on sale or return, Messrs. Simpkin, Marshall & Co. being debited with the number of copies supplied and then credited with the value of the number returned.

The Fine Arts Copyright Act of 1862 makes copyright assignable, but provides, s. 3: "Every assignment thereof . . . . shall be made by some note or memorandum thereof in writing, signed by the proprietor of the copyright, or or by his agent appointed for that purpose in writing."

Peterson, K.C., and *Wright Taylor*, for the plaintiffs. Two legal points are raised by the defence—(1.) there is no copyright because it was not registered before the commencement

of the Act of 1911; (2.) that there was no sufficient memorandum in writing of the assignment. But *Tuck & Sons* v. *Priester* (1) shews that the Act of 1862 recognizes the existence of copyright before registration, though the owner could not sue for breach of copyright until he registered. Therefore there was an existing copyright before the passing of the Act of 1911, and that Act gives the plaintiffs the copyright mentioned in Sched. I. in place of the existing right. It is quite plain that until the passing of the Act of 1911 the plaintiffs could have registered their copyright at any time and then sued for breach of it. There is nothing in the Act of 1911 to take away that right. The memorandum is sufficient because parol evidence is admissible to identify the pictures.

The defendants are responsible for the sale by their agents since the date of the offer. A delivery on sale or return does not pass the property until the goods sold are ascertained: Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 16. The property in the copies unsold remained in the defendants and they ought to have called them in. The offer before action was insufficient, for it did not include submission to an order and the plaintiffs were entitled to an order.

Butcher, K.C., and *Watt*, for the defendants. The defendants have proved that at the date of the alleged infringement they were not aware, and had no reasonable ground for suspecting, that copyright subsisted in this picture; therefore they are within s. 8 of the Act of 1911, which provides that in such a case "the plaintiff shall not be entitled to any remedy other than an injunction or interdict in respect of the infringement." The defendants' letter of December 9, 1913, therefore offered the plaintiffs all the relief they were entitled to, and the action was useless and ought to be dismissed with costs. Possibly if the plaintiffs could prove any sales by the defendants after this offer they might make them liable. But they do not even allege any sales by the defendants. They allege sales by several firms called our agents, but these firms were not agents in the ordinary sense, but wholesale newsagents who took copies of the defendants' paper on sale or return. They have only proved one of the

(1) (1887) 19 Q. B. D. 48.

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alleged sales, namely, that by Simpkin, Marshall & Co.; that was a sale, procured by a trap order from the plaintiffs' agent, long after the time at which the evidence shewed that ordinary sales were over. *Kirkham* v. *Attenborough* (1) shews that the defendants had no power to insist on the return of any of these copies, and so they cannot be responsible for their sale.

As to the legal points. The granting of copyright in existing works by the Act of 1911 is regulated by s. 24 and Sched. I., which only give the enlarged rights of copyright under the Act to persons who have copyright already. The copyright in a picture was first created by the Act of 1862, and s. 4 of that Act provides that no proprietor of any copyright shall be entitled to the benefit of the Act until his copyright is registered. The words of the Copyright Act of 1842 (5 & 6 Vict. c. 45) are very different. There it is provided (s. 24) that an omission to register shall not affect the copyright in any book, but only the right to sue. Artistic copyright was one of the benefits given by the Act of 1862. Until registration the plaintiffs here had no copyright, but only an inchoate right to acquire it by registration. They could not therefore take the larger rights given by the Act of 1911.

NEVILLE J. This action raises several points. It is an action brought by Messrs. Savory, Limited, against the World of Golf, Limited, and the matter in question arises in this way. The plaintiffs had purchased from an artist, Mr. Thomas, a picture which was subsequently made use of and produced by them, called "Thirteen Down," a picture of a despondent player of golf making his way to the next tee under, to him, unsatisfactory circumstances. Subsequently to the purchase, and some considerable time afterwards, there appeared as an advertisement in the *World of Golf* a reproduction of the same picture, and thereupon both the artist and the owners, the present plaintiffs, complained. Now the defendants say, and I have no doubt with perfect truth, that they were entirely innocent of any intention to infringe copyright when they admitted the insertion of that advertisement in their paper, and referred to it in their letter-

(1) [1897] 1 Q. B. 201.

press. When a complaint was made by the plaintiffs' solicitors to the defendants' solicitors, a suggestion was made that out of Court satisfactory terms could be made, and an offer was suggested on the part of the solicitors for the defendants, which, it is argued, would have given, had it been accepted, the plaintiffs all that they were entitled to, and that, if that were so, then the writ was improperly issued and the action improperly brought and ought to be dismissed with costs. The writ was issued and the action proceeded to trial. The defendants in their defence denied the rights of the plaintiffs, but also set up this offer before action and suggested that on that ground the action should be dismissed. There were certain other offers made during pendency of the action, which in my opinion were not all that the plaintiffs were entitled to demand, and therefore cannot come into consideration in the determination of the case at the present time. Nor do I think that the offer made before action can come into consideration either under the circumstances. In my view, where a right of this kind has been infringed by a defendant, the plaintiff is entitled to an order and is not debarred from exercising his right to sue by a suggestion on the other side that they will promise not to do it again and will pay such damages as may be agreed between them. I am not going to consider it, and it is not necessary from the point of view I take, but supposing that the plaintiffs had been offered all that they were entitled to except an order, and that then the writ was issued and the defendants had repeated the offer that they made before action, enlarging their offer by including the costs of the action up to date, and then the plaintiffs had persisted with the action, I think the whole of the subsequent costs, from the time of their offer to submit to an order, would be cast upon the plaintiffs, but that in my opinion is the only way in which, where a wrong has been done, the defendant can escape from the liability of having the rights which have been infringed asserted in a Court of law and a proper order obtained. Therefore I think I have to go into the merits of the case.

The next question that arises is whether the plaintiffs have got copyright in this picture in respect of which they can sue. That depends, in the first instance, upon the construction of two Acts

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of Parliament, the Copyright Act of 1911 and the Fine Arts Copyright Act of 1862. Sect. 24 of the Copyright Act of 1911 provides that "Where any person is immediately before the commencement of this Act entitled to any such right in any work as is specified in the first column of the First Schedule to this Act, or to any interest in such a right, he shall, as from that date, be entitled to the substituted right set forth in the second column of that schedule." When we turn to the schedule we find, "In the case of works other than dramatic and musical works," in the first column, "Copyright," and under the words "Substituted Right" in the second column there is "Copyright as defined by this Act." Therefore we have to ascertain whether the plaintiffs at the date of the passing of that Act were entitled to copyright. That throws us back upon consideration of the Act of 1862. The Act of 1862 gives copyright to the author or the vendee or assignee of any original painting and so on, and by s. 4 it is provided that no proprietor of any such copyright shall be entitled to the benefit of the Act until registration—that is a reference to registration under the Act of 1862, which is there provided for —and no action shall be sustainable or any penalty be recovered in respect of anything done before registration. It is argued that the result of that provision is that at the date of the passing of the Act of 1911 the plaintiffs had no copyright in the picture, because undoubtedly they had not registered, and I have to consider whether they had copyright. In my opinion they had. I think it would be strange to hold otherwise, because if I did I should be holding that the Act of 1911 was taking away from them a right which at that time they possessed, because had they chosen at that date to have registered their copyright they could have immediately afterwards sued anybody who infringed it, whereas by the Act of 1911 the whole machinery of registration was swept away and it is impossible to register, and consequently, unless the Act of 1911 took something away from them, they are entitled to something, and that something I take to be copyright. Sect. 4 refers to "no proprietor of any such copyright," shewing that a person may be the proprietor of a copyright and yet may not under that Act have a right to sue. I think, therefore, that at the date of the passing of the Act of 1911 the plaintiffs were

entitled to copyright, and that from that date they took the substituted copyright appearing in the second column of the First Schedule to the Act.

That brings one to the consideration of another point, and that is whether there is any sufficient memorandum of the contract to pass the copyright to the purchaser of the picture in the present case. It appears to me that, taking s. 1 of the Act of 1862 in connection with s. 3, the result is that after the passing of the Act neither the person selling nor the person purchasing can avail himself of the copyright unless there is a memorandum in writing shewing either that the copyright has been preserved or that the copyright has been transferred or assigned to the purchaser, and that must be, so far as the vendee or assignee is concerned, at or before the time of such sale or disposition. Now, here there is a memorandum in writing, and two points are raised upon it. It is duly signed, and it is in the form of a receipt stamped as an agreement, and the receipt is for "four golfing subjects," and is with Messrs. Savory, the present plaintiffs. It is said, first of all, that this was not signed at or before the sale or disposition. In my opinion, on the evidence there was no sale or disposition apart from this, and this was part of the transaction and consequently was at the time of sale. I think in all these cases the question is one of substance, whether there were two transactions or whether there was in fact one transaction. In my opinion there was one transaction, and this was part of it, and therefore I think the memorandum is good on that ground.

Then it is said that there is not a sufficient description of the subject-matter of the memorandum to be found in it, the subject being "four golfing subjects." Now it is said that I cannot or that I ought not to admit parol evidence to identify those four golfing subjects, and that if I do not do that I cannot tell what particular golfing subjects were intended and referred to in the document itself. It appears to me that the cases that have been referred to shew clearly that I am entitled to receive evidence for the purpose of identifying the subject-matter of the contract. I think that both *Shardlow* v. *Cotterell* (1) and *Plant*

(1) (1881) 20 Ch. D. 90.

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v. *Bourne* (1) are authorities to the effect that parol evidence to identify the subject-matter of a contract is admissible. Here I think there can be no doubt upon the construction of the memorandum itself that four particular golfing subjects are referred to, and it seems to me that the difficulty in both the cases that I have referred to which was under consideration was whether the terms of the agreement indicated that no particular property was intended, but something which might be selected by one of the parties hereafter. In one case it was twenty-four acres of land in such and such a parish, and it was said there that you could not say that that was an agreement to sell any particular twenty-four acres, and it was held that you could shew by parol evidence that a certain twenty-four acres had been marked out and that they were the subject-matter of the contract between the vendor and the purchaser. I think therefore in this case I am entitled to hear evidence as to what the four golfing subjects purchased by the plaintiffs from Mr. Thomas were. In my opinion the evidence shews that those four golfing subjects included the picture "Thirteen Down." That is the subject-matter of the present action. In my opinion, therefore, the assignment of the copyright is sufficiently shewn by the memorandum in writing signed by the proper party.

That I think disposes of the points that have been raised in the present case, and the only question is the question as to damages. Admittedly under the Act the plaintiffs cannot recover damages in respect of acts of infringement made innocently by the defendants, and that of course does away with a great part of the injury that they may have suffered by what has taken place. But there is evidence to this effect, that newsagents some time after the full knowledge of the defendants that the copyright was being infringed were in possession of several copies of the infringing document, and in my opinion they were in possession of those copies by the assent and at the will of the defendants. The newsagents dealt with the defendants on the usual terms of sale or return, and in my opinion the property at the time in question was vested in the defendants. True it is that had they endeavoured to recover from the

(1) [1897] 2 Ch. 281.

persons in question, Messrs. Simpkin, Marshall & Co., the copies in question, Messrs. Simpkin, Marshall & Co. might have exercised their option to retain them. In such case the property would have ceased to be in the defendants and would have vested in the newsagents. But so long as the newsagents had not exercised their option to retain and had still the right to return the copies as unsold it appears to me that the property in those copies was vested in the defendants and that it was their duty to have recalled them, although it is quite true that had they exercised the right of ownership which they had at that time it might have been defeated by the newsagents saying "No, we elect to retain them." Nothing of the kind was done, they were not attempted to be collected, and I think the defendants were responsible for what occurred. One copy was subsequently sold. I think in respect of that damages might have been recovered. No damages are asked for except nominal damages, but I think it right, in order to indicate the reason why I am going to make the judgment in the form that I do, to refer to that. The plaintiffs claim what I think they are entitled to, an injunction and delivery up of the infringing copies, and damages. I think that they are entitled to recover nominal damages and no more, and I give them 5*s*. damages on that head, and I think they must also have the costs of the action.

Solicitors: *Peacock & Goddard, for Bevan, Hancock & Co., Bristol; Webster & Webster.*

J. R. B.

SARGANT J.
1914
June 16.

J. T. SMITH AND J. E. JONES, LIMITED *v.* SERVICE, REEVE & CO.

[1914 J. 641.]

Practice—Application for Judgment—Infringement of Copyright, Registered Design, Trade Mark, or Patent—Consent to Order in Chambers—Motion in Court—Costs—Rules of the Supreme Court, 1883, *Order* XXXII., *r.* 6.

Where the plaintiff in an action for the infringement of his registered design, or trade mark, or patent, is proceeding to obtain a judgment restraining the infringement, it is desirable that some publicity should be given to the order; and, although the defendant has consented to the order, the plaintiff is entitled to the costs of moving in open Court, and not merely to such costs as would have been incurred by applying by summons in chambers.

Gandy Belt Manufacturing Co. v. *Fleming, Birkby & Goodall* (1901) 18 Rep. Pat. Cas. 276 and *Royal Warrant Holders Association* v. *Kitson* (1909) 26 Rep. Pat. Cas. 157 followed.

London Steam Dyeing Co. v. *Digby* (1885) 36 W. R. 497, *Allen* v. *Oakey* (1890) 62 L. T. 724, and *Slazenger* v. *Pigott* (1895) 12 Rep. Pat. Cas. 439 not followed.

This action was brought by the registered proprietors of a registered design for an injunction to restrain the defendants from applying or causing to be applied, for the purposes of sale, to any mercerized brocades or other textile piece goods the plaintiffs' registered design or otherwise infringing the plaintiffs' copyright in the design; an order for delivery up on oath of goods made in infringement of the design; penalties as by statute provided; damages or an account of profits; and costs.

In the course of correspondence the plaintiffs' solicitors informed the defendants that the clients of the former would insist on an order or judgment in open Court, with such relief as they were entitled to, and asked whether the defendants were prepared to submit to such a judgment. The defendants, who had entered an appearance in the action, protested that they had acted innocently, and by their solicitor offered to consent to the injunction asked for, to verify certain allegations by affidavit, to pay costs up to and including judgment, and to pay a fixed sum for penalties into Court with their defence admitting liability.

The defendants' solicitor, in his letter, added that in the circumstances "there seems no reason why, as soon as my clients have delivered their defence, the action should not be summarily and inexpensively disposed of in chambers." Some days afterwards the plaintiffs delivered notice of motion for judgment in the terms of minutes embodying the terms of the defendant's solicitor's letter, and at the same time the plaintiffs' solicitors wrote that the judgment must be taken in Court and that they could only accept the defendants' offer upon this condition. The defendants' solicitor replied that in his view the application ought to be made by summons in chambers, and that if so made he had no objection to the wording of the minutes, but that if the application was made by motion in Court he must not be taken as assenting to the plaintiffs being entitled to any more costs than they would have been entitled to upon an application at chambers.

L. B. Sebastian, for the plaintiffs. The minutes have been prepared in accordance with the terms offered by the defendants, but there is also the question about the costs.

[SARGANT J. They are prefaced with the words "The defendants by their counsel consenting." Do they consent?

Greenland, for the defendants. The only question is as to the costs.]

The defendants wish to contend that the order ought to have been taken in chambers, and that the plaintiffs are only entitled to such costs as they would then have been entitled to. But it is absolutely necessary that publicity should be given to a matter of this kind so that other persons may be warned against infringing the design.

[SARGANT J. If there is not consent, you move for judgment on your statement of claim.]

Greenland. The notice of motion is dated the day before the day on which the time for delivery of the defence expired, and the plaintiffs were not then in a position to move. But the only point is as to the costs. In the Annual Practice, 1914, p. 536, it is stated that "if the defendant consents to the requisite order being made in chambers, the plaintiff, if he moves, will only be

SARGANT J. allowed the costs of a summons." This statement is supported by the two cases cited, namely, *London Steam Dyeing Co.* v. *Digby* (1) and *Allen* v. *Oakey* (2), which were both decisions of North J. At p. 1184 of the Annual Practice it is stated that "where a plaintiff or petitioner proceeds by a more expensive method rather than by the cheaper, he may be ordered to pay the costs of the difference . . . . So if he proceed in an action for redemption by writ, rather than by originating summons, ... Where, however, the rule gives an option, the applicant may avail himself of it . . . . but where a plaintiff adopts an entirely wrong procedure, as in *In re Nichols and Von Joel's Contract* (3), he may, though successful, have to pay the opponent's costs." It was a condition of the offer to start with that the action should be disposed of in chambers, and the plaintiffs are not entitled to advertise their design at the defendants' expense. There was no intentional infringement.

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L. B. Sebastian, in reply. The costs are in the discretion of the Court unless the parties agree as to them. According to the authorities that discretion will be exercised in the plaintiffs' favour. In the case of an infringement of trade mark, where minutes were agreed, Byrne J. held that the plaintiffs were entitled to bring on the matter in Court and to the costs of the action: *Gandy Belt Manufacturing Co.* v. *Fleming, Birkby & Goodall.* (4) In an action to restrain the defendants from using the Royal Arms and the words "By appointment," Swinfen Eady J. held that the plaintiffs were justified in bringing on the matter in open Court and ordered the defendants to pay the costs of the action: *Royal Warrant Holders Association* v. *Kitson.* (5) It is true that the two decisions of North J. which have been referred to were not cited before Swinfen Eady J.; but another decision of North J. to the same effect—*Slazenger* v. *Pigott* (6)—was cited.

SARGANT J. This is a very small point, namely, whether the plaintiffs, on moving in open Court for an agreed judgment to

(1) 36 W. R. 497.
(2) 62 L. T. 724.
(3) [1910] 1 Ch. 43.
(4) 18 Rep. Pat. Cas. 276.
(5) 26 Rep. Pat. Cas. 157.
(6) 12 Rep. Pat. Cas. 439.

restrain an infringement of their registered design, are entitled to have the ordinary costs of such a motion, or only such costs as would have been incurred had the application been made in chambers, including the costs of preparing the minutes.

Two decisions of North J.—*London Steam Dyeing Co.* v. *Digby* (1) and *Allen* v. *Oakey* (2), which are referred to in the Annual Practice, 1914, p. 536—and a third decision, also of North J., to the same effect, in a case of *Slazenger* v. *Pigott* (3), are in the defendants' favour. If these three cases were the only cases on the subject, I should feel bound to follow them, but in *Gandy Belt Manufacturing Co.* v. *Fleming, Birkby & Goodall* (4), before Byrne J., the contrary view was taken, though I must say that the cases before North J. were not cited to him. And again, in *Royal Warrant Holders Association* v. *Kitson* (5), before Swinfen Eady J., as he then was, in which *Slazenger* v. *Pigott* (3) was cited to the learned judge, he took the view that the plaintiffs were entitled to bring the motion on in open Court.

It seems to me that in such a case as this, of infringement of design, or infringement of trade mark, or infringement of patent, it is desirable that some publicity should be given to the order, and I think that I had better follow the decision of Swinfen Eady J. and give the costs of this motion to the plaintiffs. The order will be in the terms of the minutes.

Solicitors for plaintiffs: *Grundy, Kershaw, Samson & Co.*
Solicitor for defendants: *John W. Barton.*

(1) 36 W. R. 497.
(2) 62 L. T. 724.
(3) 12 Rep. Pat. Cas. 439.
(4) 18 Rep. Pat. Cas. 276.
(5) 26 Rep. Pat. Cas. 157.

F. E.

SARGANT J.

1914

June 16.

In re CHESTER.

SERVANT *v.* HILLS.

[1913 C. 3424.]

Will—Construction—Gift to "my cousins and half cousins."

A testatrix, who had lived in the West Riding of Yorkshire, left property in trust for "my cousins and half cousins." She had first cousins, first cousins once removed (both upwards and downwards), second cousins, and first cousins twice removed. There was evidence that in the testatrix's neighbourhood it was the usual custom to speak of first cousins once removed as half cousins, but some slight evidence that even in that district there was some doubt about the use of the word in that precise sense:—

Held, that the term "half cousin" must have the meaning given to it in the English language as used in ordinary life; that no particular local signification should be attached to it; and that first cousins, first cousins once removed, and second cousins took under the gift.

Elizabeth Chester, of Thorne, in the county of York, spinster, by her will, dated December 5, 1903, appointed A. T. Baker trustee and executor of her will and devised her residuary real and personal estate to him upon trust to pay the income to her nephew J. C. Coulman, of Thorne, aforesaid, during his life, "And after his decease Upon trust to pay the sum of 2000*l.* to the Spinsters' Charity and to divide the residue thereof equally between my cousins and half cousins."

Testatrix died in 1903. Baker having renounced probate, administration with the will annexed was granted to Coulman, and he and James Servant were appointed trustees of the will. Coulman died in 1913, and Servant issued an originating summons against Margaret Hills (a first cousin of the testatrix on the paternal side), William H. Oxley (a son of a first cousin of the testatrix on the maternal side, and therefore her first cousin once removed), Constance E. Facklam (a daughter of a first cousin of the testatrix on the paternal side, and therefore her first cousin once removed), Lilian Fenkart (a daughter of C. E. Facklam, and therefore first cousin, twice removed, of the testatrix), Elizabeth Marples (a second cousin of the testatrix on the paternal side), and Albert Hutton (a second cousin of the

testatrix on the paternal side), for the determination of the question whether under the gift to "cousins and half cousins" any of the following classes of persons, namely, (*a*) children of the testatrix's first cousins, (*b*) grandchildren of the testatrix's first cousins, (*c*) first cousins of the testatrix's parents, and (*d*) children of first cousins of the testatrix's parents, were entitled to participate, or whether only first cousins properly so called were entitled.

The plaintiff in an affidavit stated as follows: "The term 'half cousin' possesses a local meaning in the West Riding of Yorkshire, and elsewhere in that county, and is used to denote the children of a first cousin, that is to say, persons who would, as I understand, properly be called first cousins once removed .... I can from my own personal experience and knowledge speak to the existence of such local meaning, and as the result of the enquiries I have made I have been informed and believe that the term 'half cousin' is used in Yorkshire as meaning the child of a first cousin and I have so used the term with regard to my own relations. The testatrix resided in Yorkshire during the whole of her life."

Other Yorkshire deponents said that "half cousin," in the West Riding, had a local meaning denoting the relationship more generally denoted by the expression "first cousin once removed," that is to say, the children of first cousins or the cousins of parents, and one added that the expression was used in that sense "by persons of all ranks in life in Yorkshire, and the more correct expression 'first cousin once removed' is rarely if ever used except by lawyers and precisions. I am not prepared to say that the phrase 'half cousin' may not also sometimes be used as denoting some other degree of consanguinity more remote than first cousin, such as second cousin or grandchild of a first cousin."

Sir James Murray's Oxford English Dictionary says that "half cousin" means: "The child of one's father's or mother's cousin; a second cousin. Sometimes applied to the child of one's own cousin, or to the cousin of one's father or mother."

Wright's English Dialect Dictionary gives as the meaning of "half cousin": "First cousin once removed."

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CHESTER, *In re.* SERVANT *v.* HILLS.

In Webster's International Dictionary (ed. 1911) a half cousin is stated to be "The child of a half uncle or half aunt."

J. Rolt, for the plaintiff, stated the facts and the question involved. He referred to the Oxford English Dictionary, title "Half Cousin."

W. F. Swords, for the defendant Hills. The gift, so far as it is to half cousins, is void for uncertainty. The evidence shews that it has no precise meaning either in England generally or in Yorkshire in particular.

R. H. R. Reeve, for the defendant Oxley. The term "half cousin" means only a first cousin once removed, at any rate in Yorkshire.

H. B. Vaisey, for the defendant Facklam. The gift includes first cousins once removed, including, it must be admitted, not only the children of first cousins, but also the cousins of either parent.

E. M. Lee, for the defendant Fenkart. The gift includes first cousins twice removed.

D. D. Robertson, for the defendant Marples, and *W. H. Salter* (*J. F. W. Galbraith* with him), for the defendant Hutton. The gift includes second cousins.

SARGANT J. This is a summons which raises the question as to who are included under a gift to the testatrix's cousins and half cousins. The testatrix left all her property upon trust for her trustees to pay the rents and profits and income to her nephew John Chester Coulman during his life, and after his decease, subject to a gift to a charity, they were to divide the residue thereof equally between her cousins and half cousins. The testatrix had a very numerous collateral family, and the contest is between a first cousin,—who undoubtedly takes as a cousin, and who claims that only first cousins can take—first cousins once removed,—that is, removed both upwards and downwards—second cousins, and first cousins twice removed, and I am not sure whether there are any other more distant relatives. It is quite clear, of course, that the first cousin takes. I think also I ought to say this, that, in my opinion, the term "half cousin" is

not so indefinite that the argument must be acceded to that all cousins except first cousins are to be rejected.

The real contest seems to me to lie between first cousins once removed and second cousins. A considerable body of evidence has been put before me to shew that in the neighbourhood where the testatrix lived, the West Riding of Yorkshire, it is the custom to speak of first cousins once removed as half cousins, and that that is the usual meaning of the word. On the other hand, there is some evidence, though not such strong evidence, to shew that there is a certain amount of doubt about the use of the word in that precise sense even in the district in question. And I think that this general observation has to be borne in mind, that there is nothing to shew that the testatrix is employing the words "cousins" and "half cousins" in any special local signification. No part of her will is written in dialect, and I think that on the whole it is safer for me to give a meaning to the word such as it bears in the English language, ordinarily speaking, as used in ordinary life, without attempting to give the term any particular local signification. Now, what is that meaning? In Sir James Murray's Oxford English Dictionary, which perhaps may be taken as the standard dictionary on such matters, "half cousin" is defined as: "The child of one's father's or mother's cousin; a second cousin. Sometimes applied to the child of one's own cousin, or to the cousin of one's father or mother." In the English Dialect Dictionary the definition of "half cousin" is: "A first cousin once removed." An interpretation that was suggested to me, that "half cousins" might mean cousins by the half blood, must be rejected, because it is shewn that the testatrix had no cousins by the half blood.

On the whole, I think I must hold that there are included in the gift first cousins, first cousins once removed, and second cousins.

Solicitors for the plaintiff and one of the defendants: *King, Adams & Co., for S. P. Constable, Thorne, Doncaster.*

Solicitors for the other defendants: *H. R. B. Tweed; Haslam & Sanders, for F. Mayson, West Hartlepool.*

F. E.

SARGANT J.

1914

June 18;
July 22.

In re FORSTER-BROWN.

BARRY *v.* FORSTER-BROWN.

[1914 F. 544.]

Will—Construction—Shares of Residue—Period of Distribution—Advances to Residuary Legatees — Recoupment of Income to Unadvanced Legatees — Hotchpot.

A testator gave his wife the personal use and occupation during widowhood of a certain house which, subject thereto, was to form part of his devised real estate. And he made a general residuary gift of all his real and personal estate to trustees, upon trust for sale, conversion, and investment (but with full powers of postponement and retention), and declared that the resulting trust fund should be held on trust, in the first place, out of the income thereof, to pay to his wife during widowhood such a sum as, together with the income under her marriage settlement, would make up the yearly sum of 2000*l.*, and he provided that if the income of the trust fund should not in any year be sufficient to make up the 2000*l.*, the whole of the income in that year should be paid to her, and any deficiency should be made up when the subsequent income of the trust fund would permit. The trustees were (after providing for an annuity which failed) to appropriate 4000*l.* on trusts for the benefit of a son P., and, subject as aforesaid, testator directed that the capital and interest of the trust fund should be held in trust for such of his sons W., E., and J. and his daughters I. and D. as being sons should attain twenty-one or being daughters should attain twenty-one or marry, and so that the share of a son should be double that of a daughter. And testator gave power to the trustees, but only with the widow's consent during widowhood, to advance a certain proportion of the share of any of the children, and then settled the share of each daughter (less any sum advanced) on trust for her for life, and after her death for her children, with an ultimate trust on failure of children for her brothers equally. By a codicil he increased the widow's annuity to 3000*l.* By another codicil, after reciting that on the marriage of his daughter I. he had covenanted with her settlement trustees that his executors or administrators would after his death pay such trustees 7200*l.*, with 4 per cent. interest as from his death, to be held on the trusts of the settlement, testator declared that the 7200*l.* should be taken in or towards satisfaction of the share of the daughter and her issue under the will, and should be brought into hotchpot and accounted for accordingly. By still another codicil testator provided that, if D. should marry during the wife's widowhood, the trustees might settle on her marriage a sum equal to that settled on I., which equal sum should then cease to be subject to the widow's annuity and the other will trusts, but should be taken in or towards satisfaction (and

the like as in the case of I.). On testator's death his executors paid the 7200*l.* to I.'s settlement trustees, and as from his death she received the income of that fund. On the marriage, after testator's death, of D., the will trustees transferred 7200*l.* to her settlement trustees free from the widow's annuity, and D. thenceforth enjoyed the income of that sum. The value of testator's estate at his death was about 80,000*l.*, and the income (even after the subtraction of both sums of 7200*l.*) was sufficient to provide for the widow's annuity and interest on the 4000*l.* trust legacy. The trustees dealt with the income and kept the accounts on the basis of *In re Hargreaves* (1903) 88 L. T. 100; and no income was paid to I. from testator's death or to D. from the date of her marriage, and there was an accumulated deficiency in respect of each of their shares. After appropriation of all charges on the income of the residue as from the testator's death to the widow's death, as between the several shares thereof, the shares of I. and D. in such income were insufficient to meet the shares of the charges so appropriated thereto respectively:—

Held, that the period of distribution was the death of the widow, and that I. and D. were not chargeable with the deficiencies down to the widow's death, but were entitled as from that date to the full income of their shares in the residuary estate after bringing the sums settled on them into hotchpot at that date.

In re Poyser [1908] 1 Ch. 828 and *In re Craven* [1914] 1 Ch. 358 followed.

In re Hargreaves 88 L. T. 100 distinguished as a peculiar case.

Semble, that *In re Rees* (1881) 17 Ch. D. 701 and *In re Dallmeyer* [1896] 1 Ch. 372 shew that in any ordinary case of a direction to bring advances into hotchpot—advances made whether by the testator himself or by his trustees pursuant to directions in his will—interest is not accumulated against advanced children between the testator's death and the period of distribution.

By his will, dated September 13, 1902, Thomas Forster-Brown appointed his wife and his sons Westgarth Forster-Brown and Otto Forster-Brown to be executors and trustees, and, after certain specific and pecuniary bequests, gave his wife the personal use and occupation of his house called Springfort, Stoke Bishop, during her widowhood or so long during her widowhood as she should desire, and, subject thereto, directed that the same should form part of his real estate and pass under the devise therein contained, but so as during the widowhood of his wife to be sold only at her express request in writing. And the testator made a general residuary gift of all his real and personal estate to his trustees, upon trust for sale, conversion, and investment (but with full powers of postponement and retention

SARGANT J. 1914 FORSTER-BROWN, *In re.* BARRY *v.* FORSTER-BROWN.

especially as to colliery shares, and with power to lease unsold real estate for any period not exceeding twenty-one years), and declared that the resulting trust fund should be held upon trust, in the first place, out of the income thereof to pay to his wife during her widowhood such a sum as, together with the income coming to her under their marriage settlement, would make up the yearly sum of 2000*l.*, and he provided that, in case the income of the trust fund should not in any year be sufficient to make up the said yearly income of 2000*l.*, the whole of the income in that year should be paid to his wife, and any deficiency should be made up to her when the subsequent income of the trust fund would permit. The trustees were next to provide out of the said income an annuity of 208*l.* per annum for a daughter Helen, and then to appropriate a sum of 4000*l.* on certain trusts for the benefit of his son Percy, and, subject as aforesaid, the testator directed that the capital and income of the said trust fund should be held in trust for all or any of the testator's children, Westgarth, Edward, James, Isabel and Doris, as being sons should attain twenty-one or being daughters should attain that age or marry, and so that the share of each son was to be double that of each daughter, the result being that the prospective share of each of the three sons was a quarter, and of each of the two daughters an eighth, of the whole. The testator then gave power to his trustees, but during the widowhood of his wife only with her consent in writing, to advance a certain proportion of the shares of any of his children, and proceeded to settle the shares of his daughters (less any sum advanced) upon trust for her during her life, without power of anticipation during coverture, and after her death for her children, with an ultimate gift on failure of children for her brothers in equal shares.

The testator subsequently, in the years 1902 to 1907 inclusive, made seven codicils to his will, of which, however, it is only necessary to refer to the first, the fourth, the fifth, and the sixth. By the first codicil, dated November 4, 1902, the testator empowered each of his daughters to appoint a life interest or any less interest in her trust fund to any husband who should survive her. By the fourth codicil, dated November 16, 1905, the testator increased the total annuity payable to his widow under

his will and marriage settlement from 2000*l.* to 3000*l.* By the fifth codicil, dated November 17, 1906, after reciting that upon the marriage of his daughter Isabel Marion Balsdon (the wife of Richard E. C. Balsdon) he entered into a covenant with the trustees of her marriage settlement that his executors or administrators should, within six calendar months after his death, pay to such trustees the sum of 7200*l.*, with interest thereon at the rate of 4*l.* per cent. per annum from the date of his death, to be held upon trust as in the said settlement mentioned, the testator declared that the said sum of 7200*l.* should be taken in or towards satisfaction of the share in his residuary trust estate bequeathed by his said will upon trust for his said daughter and her issue, and should be brought into hotchpot and accounted for accordingly. And by the sixth codicil, dated May 9, 1907, the testator provided that, in case his daughter Doris should marry during his wife's life and widowhood, the trustees or trustee of his will might settle on her marriage a sum equal to that settled on Mrs. Balsdon, and declared that any sum so settled should thereupon cease to be subject to the annuity bequeathed by him to his wife, or to the trusts declared by his said will and previous codicils, but should be taken in or towards satisfaction of the share in his residuary estate bequeathed by his said will upon trust for his said daughter and her issue, and should be brought into hotchpot and accounted for accordingly.

The testator died on October 23, 1907, and his will and codicils were proved on November 28, 1907, by his widow, his said two sons, and also by C. E. Barry, who had been appointed an additional trustee and executor by the seventh codicil to the will. The annuity of 208*l.* given by the will wholly failed by the death of his daughter Helen in the testator's lifetime. After the death of the testator his executors duly paid the sum of 7200*l.* covenanted to be settled on the marriage of Mrs. Balsdon. From that time forward, and, indeed, as from the date of the death of the testator, she had enjoyed the income of this sum.

The testator's daughter Doris married a Mr. Smith in the year 1912, and shortly after that marriage, namely, on or about April 27, 1912, the trustees of the will exercised the power given by the sixth codicil thereto by settling, by an indenture of that

SARGANT J. 1914 FORSTER-BROWN, *In re.* BARRY *v.* FORSTER-BROWN.

date, a sum of 7200*l.* upon her and her issue and husband, as provided by the codicil, free from the annuity given to the testator's widow, and by actually handing over and transferring to the trustees of the settlement cash and securities to the total value of 7200*l.* From that time forward Mrs. Smith had in her turn enjoyed the income of that sum.

The testator's widow died on January 12, 1914.

The net value of the testator's estate at his death was ascertained as being of an actual and estimated value of 80,112*l.* The income of the testator's estate was throughout, and even after the subtraction of the second sum of 7200*l.* for Mrs. Smith's settlement, sufficient to provide for the widow's annuity of 3000*l.* and the interest on the trust legacy of 4000*l.* The trustees dealt with the income and kept the accounts of the estate on the basis of *In re Hargreaves.* (1) No income was paid to Mrs. Balsdon from the death of the testator, or to Mrs. Smith from the date of her marriage, and there appeared in the accounts an accumulated deficiency of 945*l.* 7*s.* 9*d.* in respect of Mrs. Balsdon's share, and a like deficiency of 189*l.* 11*s.* 6*d.* in respect of Mrs. Smith's share.

An originating summons was taken out by C. E. Barry, one of the trustees and executors, against Westgarth Forster-Brown and Edward Otto Forster-Brown (the other trustees and executors who were also beneficially interested under the will) and James Cameron Forster-Brown, and Mrs. Balsdon and Doris Ives Smith, as beneficiaries under the will, for the determination of the question whether (upon the true construction of the will and codicils, and in the events that had happened, and having regard to the direction in the fifth codicil that the 7200*l.* in the will mentioned as payable by the executors to the trustees of the marriage settlement of Mrs. Balsdon should be taken in or towards satisfaction of the share in residue bequeathed by the will upon trust for her and her issue and should be brought into hotchpot and accounted for accordingly, and the settlement of 7200*l.* made under the sixth codicil in favour of Mrs. Smith and her issue and the provisions in that codicil relating thereto, and to the fact that, after due appropriation of all charges on the

(1) 88 L. T. 100.

income of the residuary estate as from the death of the testator to the death of his widow, Marion Ives Forster-Brown, as between the several shares thereof, the shares of Mrs. Balsdon and Mrs. Smith in such income had become insufficient to meet the shares of the said charges so appropriated thereto respectively as aforesaid) the trustees ought to make any and what adjustment in favour of W. Forster-Brown, E. O. Forster-Brown, and J. C. Forster-Brown respectively out of the income, as from the date of the testator's death and in future, or any other and what period, of the shares of the residuary estate settled for the benefit of Mrs. Balsdon and Mrs. Smith respectively, or whether these two defendants respectively were, as from the death of the testator's widow, or the time of actual distribution of the residuary estate, or any and what time, entitled to the full income on the shares of the residuary estate so settled for their benefit respectively.

J. G. Wood, for the plaintiff. The trustees have, on advice, dealt with the income and kept the accounts on the footing that *In re Hargreaves* (1) applied, and they desire the opinion of the Court as to whether any and what recoupment out of the future income of the daughters' shares in residue should be made to the sons. [He also referred to *In re Poyser* (2); *In re Craven* (3); *In re Hart.* (4)]

Percy Wheeler, for the testator's three sons. The will clearly shews that the testator contemplated an immediate distribution of his estate on his death, subject to the life interest given to his widow. The only distinction between *In re Hargreaves* (1) and this case is that there the hotchpot clause was in a peculiar form. There was also a hotchpot clause in *In re Hart.* (4) *In re Poyser* (2) and *In re Craven* (3) are distinguishable. [He also referred to *In re Gilbert.* (5)]

Beebee, for the testator's daughters. The testator did not contemplate that there should be a division of his estate in his wife's lifetime. Her assent was required to any advance made

(1) 88 L. T. 100.
(2) [1908] 1 Ch. 828.
(3) [1914] 1 Ch. 358.
(4) (1912) 107 L. T. 757.
(5) [1908] W. N. 63.

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by the trustees to a child. *In re Hargreaves* (1) is not applicable, but *In re Poyser* (2) and *In re Craven* (3) are in my favour. [*In re Willoughby* (4) and *In re Dallmeyer* (5) were also referred to.]

Cur. adv. vult.

July 22. SARGANT J. This summons raises a question as to the result of certain directions contained in the will and codicils of the late Thomas Forster-Brown with regard to bringing into hotchpot two advances of 7200*l.* each, made on the occasion of the respective marriages of his two daughters Isabel and Doris. [His Lordship stated the facts as above set out, down to the death of the testator's widow, and continued as follows:] The net value of the testator's estate at his death was ascertained as being of an actual and estimated value of 80,112*l.*, and if it ought to have been dealt with on the basis adopted by the Court of Appeal in *In re Hargreaves* (1), the testator's children would have been respectively entitled to fractions of the testator's estate ascertained on the basis of 21,828 parts for each of the three sons, 3714 parts for the daughter Isabel Balsdon, and 10,914 parts for the daughter Doris.

Further, if on the marriage of the testator's daughter Doris the estate continued to be dealt with on the basis of the original valuation, and she were charged with the actual sum settled on her marriage and not with the fractional amount of the estate which was in fact then needed to produce that sum, the testator's children would from that time forward have been entitled to fractions of the estate ascertained on the basis of 21,828 parts for each of the three sons and 3714 parts for each of the two daughters. The income of the testator's estate has throughout, and even after the subtraction of the second sum of 7200*l.* for Mrs. Smith's settlement, been sufficient to provide for the widow's annuity of 3000*l.* and the interest on the trust legacy of 4000*l.* But if this surplus were apportioned during the two periods in question between his five children on

(1) 88 L. T. 100.
(2) [1908] 1 Ch. 828.
(3) [1914] 1 Ch. 358.
(4) [1911] 2 Ch. 581.
(5) [1896] 1 Ch. 372.

the basis of the figures mentioned in the last preceding paragraph, Mrs. Balsdon's share of such income, throughout the whole period, and Mrs. Smith's share of such income as from the date of her marriage, would respectively be considerably less than the amount of one-eighth of these prior annual charges. And if the basis adopted in *In re Hargreaves* (1) is also applicable as regards income, the deficiency would in each case have as from and after the death of Mrs. Forster-Brown to be brought into account and charged against the future income (or possibly the capital) of the share of Mrs. Balsdon or Mrs. Smith in the residuary estate. The trustees have in fact dealt with the income and kept the accounts of the estate on the basis of *In re Hargreaves*. (1) No income has been paid to Mrs. Balsdon from the death of the testator or to Mrs. Smith from the date of her marriage. And there appears in the accounts an accumulated deficiency of 945*l.* 7*s.* 9*d.* in respect of Mrs. Balsdon's share and a like deficiency of 189*l.* 11*s.* 6*d.* in respect of Mrs. Smith's share.

The question raised by the present summons is whether these deficiencies have to be made good out of the future income of these two shares respectively on the basis of *In re Hargreaves* (1), or whether, as from the death of Mrs. Forster-Brown, a fresh start has to be made. I have a vivid recollection of the case of *In re Hargreaves* (1), which was argued on the part of the appellants only, since the principle of construction suggested by Romer L.J. in the Court of Appeal was as favourable to the respondents as that applied by Joyce J. in the Court below, and was accordingly accepted by them without demur. The case was a peculiar one, and was, as the report in the *Law Times* indicates, decided solely on the very exceptional language of the will, which pointed to an immediate ascertainment of the fractional shares of the advanced and unadvanced children respectively at one definite period, namely, the day of the death of the testator, and on the basis of the market prices current at that time. It is, in my judgment, a case that should hardly have been reported, and that can be of little assistance in any case in which the language used is of a more ordinary character. It

(1) 88 L. T. 100.

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has been distinguished both in *In re Poyser* (1) and *In re Craven* (2), and the method adopted in these latter cases seems to me much more generally applicable. Further, the exceptional language of the will in *In re Hargreaves* (3), which pointed to the ascertainment of the rights of the remaindermen as if the estate had been distributable on the death of the testator, although a very large part, if not the whole of it, would in fact be kept by the trustees to meet the widow's annuity, also affected the question of the continuing liability of the shares of the remaindermen to meet any deficiency in providing a proper fractional proportion of the widow's annuity. I may add that *In re Hargreaves* (3) was in fact, though this does not of course affect the binding character of the decision in any similar case, about to be appealed to the House of Lords, and was compromised on terms which, so far as my memory serves me, freed the shares of the advanced children from liability to contribute in the future to part payments of the annuity.

In the present case it seems to me impossible to say that the testator contemplated any immediate distribution of his estate, or any ascertainment of the relative fractional shares of his children as at that date. There are many indications to the contrary, such as, amongst others, (1.) the life estate given to his widow in his residence Springfort, (2.) the special provisions as to any deficiency in the income of the residue to meet the widow's annuity, (3.) the power of retention of investments, and the directions as to intermediate income and as to the capitalization of the income of colliery shares, and (4.) the power to make a settlement on the daughter Doris free from the widow's annuity. Indeed the provisions as to this settlement alone would appear to be incompatible with a fractional ascertainment of the children's shares at any one definite period such as the death of the testator. There would seem to be no better reason for taking this period for the purpose than the period of the settlement itself, whenever that might be. And the relative fractions at the two periods would necessarily vary (as indeed is shewn by an affidavit filed by Mrs. Balsdon

(1) [1908] 1 Ch. 828. (2) [1914] 1 Ch. 358.
(3) 88 L. T. 100.

to have actually been the case here), through changes in the value of investments and differences between the estimated values of various assets and the amounts actually realized from them.

On the whole of this will I have come to the conclusion that the period of distribution contemplated by the testator was the death of his widow, and that the case is within *In re Poyser* (1) and *In re Craven* (2) rather than *In re Hargreaves.* (3) This does not indeed absolutely conclude the whole question, though it was treated, and I think rightly treated, by counsel on both sides as being the governing consideration, as was held by Stirling J. in *In re Lambert.* (4) For in neither *In re Poyser* (1) nor in *In re Craven* (2) was there any question of contribution to an overriding annuity, and it appears that if, in lieu of ascertaining fractional proportions at the testator's death, 4 per cent. interest were charged on the sums settled on the daughters, Mrs. Balsdon's deficiency, though reduced, would still amount to 638*l.* 19*s.* 10*d.*, and there might be a small deficiency also in the case of Mrs. Smith. But any doubt on this point is determined by such cases as *In re Rees* (5) and *In re Dallmeyer* (6), which seem to me to shew pretty conclusively that in any ordinary case of a direction to bring advances into hotchpot—advances made whether by the testator himself or by his trustees pursuant to directions contained in his will—interest is not accumulated against advanced children between the death of the testator and the period of distribution any more than would be the case during the lifetime of the testator himself.

In my judgment, therefore, the question raised by the summons should be answered by declaring that Mrs. Balsdon and Mrs. Smith have not to be charged with any such deficiencies as suggested in the summons down to the death of the testator's widow, but are entitled, as from that date, to the full income of their eighth shares in the testator's residuary estate after bringing the sums settled on them respectively into hotchpot at that date.

I should add, in order that it may not appear that the point

(1) [1908] 1 Ch. 828.
(2) [1914] 1 Ch. 358.
(3) 88 L. T. 100.
(4) [1897] 2 Ch. 169, 178.
(5) 17 Ch. D. 701.
(6) [1896] 1 Ch. 372.

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has been overlooked, that, while Mrs. Balsdon and Mrs. Smith have resisted being charged with any deficiency, Mrs. Balsdon has not claimed any share of income between the death of the testator and the death of the testator's widow, nor Mrs. Smith any income between the date of her marriage and the death of the widow. This attitude seems to me at first sight and without having heard any argument on the point to be right. For though interest on advances may not be accumulated against children's shares prior to the period of distribution, it is quite another thing to say that it should not be taken into account against income of residue which may from time to time be available. Or, to look at the matter in another way, the income during the widow's lifetime being payable as in respect of a residue, the distribution of which is postponed, and the unadvanced children having a preferential right in the ultimate capital to the extent necessary to bring their shares up to the level of those of the advanced children, the unadvanced children would naturally be entitled to corresponding preferential rights in the intermediate income, just as I think, though I have not to decide, they would on any intermediate distribution of capital be entitled to have that capital primarily employed in or towards levelling the unadvanced shares up to the advanced shares.

My decision comes to this: that down to the date of the death of the testator's widow the surplus income was rightly distributed amongst the unadvanced children exclusively, and, on the other hand, there is no accumulation of deficiencies against the advanced children which has to be made good out of the income subsequent to the death of the testator's widow. A fresh start is made as from that date.

The costs of all parties as between solicitor and client will be paid out of residue.

Solicitors for plaintiff and testator's sons: *Carthew, Wheeler & Hancock, for Barry & Harris, Bristol.*

Solicitors for testator's daughters: *Torr & Co., for Toller, Oerton & Balsdon, Barnstaple.*

F. E.

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In re HOLLAND.
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[1914 H. 1336.]

Power of Appointment—Exercise—Appointment to Object—Condition to pay Annuities to Persons not Objects—Validity of Appointment freed from Condition.

In cases where a power of appointment is exercised in favour of an object of the power, but conditions in favour of persons who are not objects of the power are imposed on the appointee, the difficulty in deciding the question whether the conditions are to be disregarded or render the appointment itself void is one of fact or of inference rather than of law: the law being that if there is a genuine appointment to an object of the power, coupled with an attempt to impose on the appointment conditions or trusts in favour of persons who are not objects, the appointment stands good free from the conditions, whereas if there is no genuine appointment to an object of the power, but the appointment to that object is made for purposes foreign to the power, then the whole appointment fails, whether the real purposes of the appointment have or have not been communicated to, and assented to by, the nominal appointee.

Under the will of her father a lady had power by will or codicil to appoint that all or any part of the income of certain funds (which was 600*l.* or 700*l.* per annum) should after her death be paid to her husband for life, and upon such conditions and with such restrictions as she should think fit. On her marriage with C. she had settled 3000*l.* of her own upon trust for herself for life and then, in the events which happened, upon such trusts as she should by will or deed appoint. By her will, in exercise of the power under her father's will, she appointed that after her death the income of the funds thereunder should be paid to C. during his life for his absolute use provided he should acquiesce in the several dispositions contained in her will, and so long as he should pay to each of her nieces W. and F. the sum of 50*l.* annually; and she thereby, in exercise of the power under the settlement, appointed that her trustees should out of the settled funds raise and pay her debts, funeral and testamentary expenses, and pecuniary legacies, and pay the residue thereof to her nephews and nieces; and she gave the residue of her personal estate, being her "separate estate or over which" she had any power of disposition or appointment, to C. By a codicil she revoked the appointment under her father's will to C., and instead thereof appointed that the whole of the income of the fund thereunder should be paid to C. during his life for his absolute use, provided that he should acquiesce in her testamentary dispositions and

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so long as he should pay to each of her nieces W., F., and H. the clear sum of 100*l.* annually. The Court found that the testatrix had a genuine desire to benefit C. by the appointment, and that this desire was the real motive and object of the appointment:—

Held, that the appointment to C. was good, and that the conditions imposed on him must be disregarded.

In re Perkins [1893] 1 Ch. 283 and *In re Cohen* [1911] 1 Ch. 37 distinguished.

By the will of Henry Holland, dated November 1, 1878, a moiety of his residuary estate was settled upon trust to pay the income to his daughter, Frances Elizabeth Clapton, then Frances Elizabeth Holland, during her life, for her separate use without power of anticipation, with remainder for her issue. And the testator declared that it should be lawful for his said daughter, when married, by will or codicil to appoint that all or any part of the income of that moiety should, from and after her death, be paid to her husband for his life or for any less period, and upon such conditions and with such restrictions as she should think fit; and on failure of issue of Frances Elizabeth Holland the share was (subject and without prejudice to the trusts aforesaid) given over in favour of the testator's deceased son Henry Holland as in the will mentioned.

The testator made three codicils to his will, the last two of which were after the marriage of his daughter, but these did not affect the foregoing provisions of his will.

The testator died on February 6, 1880, and it was agreed between the parties that the income of the moiety of his estate settled on his daughter was between 600*l.* and 700*l.* per annum.

The testator's daughter married Henry Clapton on June 11, 1879, and on the occasion of that marriage a settlement, dated June 9, 1879, was executed of a sum of 3000*l.* belonging to F. E. Clapton. Under that settlement the fund was settled upon trust for the wife for life, and then for H. Clapton for life, and after the survivor's death in trust for the children of the marriage as therein mentioned. And, in default of any child attaining a vested interest therein, and in the event (which happened) of the wife predeceasing her husband, the fund was to be held upon such trusts as she should, notwithstanding coverture, by will or deed appoint, and in default of appointment in trust for her

next of kin under the statutes as if she had died possessed thereof intestate and without having been married.

There was no issue of the said marriage, and Mrs. Clapton died on February 5, 1914, leaving a will and codicil which occasioned the difficulty now brought before the Court.

By her will, dated September 28, 1888, Mrs. Clapton, in exercise of the power given to her by her father's will, appointed that after her death the income of one moiety of the trust premises should be paid to her husband, Henry Clapton, during his life for his absolute use, provided he should acquiesce in the several dispositions contained in that her will, and so long as he should pay to each of her nieces, Rachel Ann Woodcock and Marion Fairbairn, the sum of 50*l.* annually. And she thereby, in exercise of a power of appointment conferred upon her by her marriage settlement, dated June 9, 1879, appointed that the trustees thereof should, out of the settled funds, raise and pay her debts, funeral and testamentary expenses, and the pecuniary legacies therein mentioned, and pay the residue thereof to her nephews and nieces living at her death and the issue living at her death of any of her nephews and nieces who might have died in her lifetime, if more than one in equal shares, but so that the issue of any deceased nephew or niece should take equally amongst them the share only which their parent would have taken had he or she been living at the time of her decease, and she thereby bequeathed the residue of her personal estate not thereby otherwise disposed of, being her "separate estate or over which" she had any power of disposition or appointment, unto her said husband, Henry Clapton, and appointed him and two other persons executors and trustees of her will.

By a codicil dated July 16, 1890, Mrs. Clapton, after referring to the dispositions made as aforesaid by her will, revoked the said appointment under the will of her father in favour of her said husband and instead thereof appointed that from and after her death the whole of the income of the said moiety of the said trust premises should thenceforth be paid to her said husband Henry Clapton during his life for his absolute use, provided he should acquiesce in the several dispositions contained in her wil[l]

SARGANT J. and in that codicil and so long as he should pay to each of her nieces, Rachel Ann Woodcock, Marion Fairbairn, and Alice Helen Holland, the clear sum of 100*l.* annually.

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Henry Arthur Holland (who was one of the seven children of the testator's son Henry Holland who survived the testator or died in his lifetime leaving issue) and two of the trustees of the testator's will took out an originating summons against Henry Clapton, and John Nelson Holland, Rachel A. Woodcock, Marion Fairbairn, and Alice Helen Holland (four of the above-named seven children) and other persons who, in the events which had happened and in default of and subject to any exercise by Mrs. Clapton of the said power of appointment were entitled to the moiety of the trust premises the income of which was paid to Mrs. Clapton during her life, asking for the determination by the Court of the following questions: (1.) Whether the appointment, by the codicil to Mrs. Clapton's will, of the income of the moiety of the testator Henry Holland's residuary estate to her husband Henry Clapton during his life for his absolute use provided he should acquiesce as therein stated and pay the annual sums therein mentioned was a valid exercise of the power given to her by her father's will of appointing the said income to her husband for his life or for any less period upon such conditions and with such restrictions as she should think fit; and (2.) whether, if the said appointment was a valid exercise of the power, the conditions and restrictions imposed by the codicil to Mrs. Clapton's will were valid to any and what extent, or whether her husband was entitled to the income appointed during his life freed from such restrictions or any and which of them.

A. St. John Clerke, for the plaintiffs, stated the facts and the questions involved.

T. Cyprian Williams, for the defendant Henry Clapton. In Farwell on Powers, 2nd ed. p. 298, it is stated that "Where there is a complete execution of a power and something added which is improper, the execution is good and the excess void; but where there is not a complete execution, or where the boundaries between the excess and the execution are not distinguishable, the whole appointment fails." For this proposition the learned

author cites, among other cases, *Alexander* v. *Alexander* (1), and he cites the following passage from the judgment in that case: "Suppose a power to a man to appoint 1000*l.* among his children; . . . . if the father gives the whole 1000*l.* to his children, and annexes a condition, that they shall release a debt owing to them, or pay money over, the appointment of 1000*l.* would be absolute; and the condition would be only void." In the present case there are three possible decisions on the testatrix's appointment: (1.) that the appointment is good and the condition void; (2.) that the appointment is wholly void; and (3.) that there is a conditional limitation and not a condition. It is submitted that the first decision is applicable. The attempt to restrict the gift by conditions is inoperative and does not cut down the absolute appointment: *Carver* v. *Bowles* (2); *Watt* v. *Creyke* (3); *Stroud* v. *Norman* (4); *Churchill* v. *Churchill* (5); *McDonald* v. *McDonald.* (6) *Carver* v. *Bowles* (2) shews that no case of election arises. The decision of Joyce J. in *In re Cohen* (7) may be cited against me, but that case, if not distinguishable, was wrongly decided; *Stroud* v. *Norman* (4) was not there cited.

Dighton Pollock, for the defendant J. N. Holland and another defendant in the same interest. The whole appointment is bad, on two grounds: (1.) because any by-motive vitiates the appointment; and (2.) because the condition cannot be separated from the gift. The by-motive of the testatrix, to benefit persons not objects of the power, clearly vitiates the appointment: *Topham* v. *Duke of Portland.* (8) As regards the direction to pay debts and the proviso as to acquiescing in the testatrix's testamentary dispositions, this stands on a different footing, and must be construed as a condition precedent outside the power which makes the whole appointment bad: *Webb* v. *Sadler* (9); *Hay* v. *Watkins* (10); Farwell on Powers, 2nd ed. p. 299.

H. T. Methold, for another defendant in the same interest.

(1) (1755) 2 Ves. Sen. 640, 644.
(2) (1831) 2 Russ. & My. 304, 308.
(3) (1856) 3 Sm. & Giff. 362.
(4) (1854) Kay, 313.
(5) (1867) L. R. 5 Eq. 44.
(6) (1875) L. R. 2 H. L. Sc. 482.
(7) [1911] 1 Ch. 37.
(8) (1863) 1 D. J. & S. 517; (1864) 11 H. L. C. 32; (1869) L. R. 5 Ch. 40.
(9) (1873) L. R. 8 Ch. 419.
(10) (1843) 3 D. & War. 339.

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I adopt the last argument. The gift of the annuities is exactly like the 500*l.* a year in *In re Cohen.* (1) [He also referred to *In re Perkins* (2) and Farwell on Powers, 2nd ed. pp. 301, 421, 432.]

Cur. adv. vult.

July 31. SARGANT J. (after stating the facts). Some discussion took place before me as to the meaning of the words in the will and codicil referring to the acquiescence of the testatrix's husband in her testamentary dispositions, and as to whether her will and codicil, so far as affecting the funds comprised in the marriage settlement, affected to deal with those funds in derogation of the life interest of the husband. But I cannot think there is any serious doubt as to this part of the case. The disposition by the will and codicil of the funds subject to the marriage settlements seems to me clearly a disposition of an immediate present interest in the funds and not merely a disposition subject to the life interest of her husband. And no suggestion has been made of anything to which this proviso as to acquiescence can refer other than and except an acquiescence by the husband in the fund in which he had a life interest being dealt with on the testator's death in a manner incompatible with the continuance of that life interest.

On the above facts there is obviously no enforceable limitation in favour of those who are not objects of the power, and, though I note that Mr. Clapton has intimated that he does not intend to take advantage of the appointment to him in his wife's will without performing the conditions sought to be imposed on him, that makes no difference in legal result. The sole question that has to be determined is whether the appointment to Mr. Clapton of a life interest is good and the conditions imposed on that gift are to be disregarded, or whether the conditions have the effect of rendering the gift itself void.

In favour of the first view there were cited to me the summary of the law contained in Farwell on Powers, 2nd ed. at p. 298, and such cases as *Alexander* v. *Alexander* (3), *Carver* v. *Bowles* (4),

(1) [1911] 1 Ch. 37.
(2) [1893] 1 Ch. 283.
(3) 2 Ves. Sen. 640, 644.
(4) 2 Russ. & My. 304.

Stroud v. *Norman* (1), and *McDonald* v. *McDonald*. (2) In favour of the second view the statement of the law in Farwell on Powers, 2nd ed. pp. 421 and 432, and such cases as *Topham* v. *Duke of Portland* (3), *In re Perkins* (4), and the recent case of *In re Cohen* (5) were mainly relied on.

In my opinion, the difficulty in these cases is one of fact or of inference rather than of law. The law is fairly well settled in principle, and lays down a clear line of demarcation. If, on the one hand, there is a genuine appointment to an object of the power, coupled with an attempt to impose on that appointment conditions or trusts in favour of persons who are not objects, then the appointment stands good free from the conditions. If, on the other hand, there is no genuine appointment to an object of the power, but the appointment actually made to that object is made for purposes foreign to the power, then the whole appointment fails as being in substance an appointment unwarranted by the power, and that whether the real purposes of the appointment have or have not been communicated to the nominal appointee and assented to by him.

On the facts of the present case I am of opinion that it falls within the former of the alternative classes of cases and not within the latter class. The benefits given to the husband of the appointor by the will, amounting to a life interest in some 600*l.* or 700*l.* a year, largely exceeded the burdens imposed on him by way of benefit to other persons, which amounted only to a sum of 100*l.* a year and a liability to lose a part—probably a small part only—of the income, amounting to under 100*l.* a year, from the funds in the marriage settlement. And I cannot doubt that the testatrix had a real genuine desire to benefit her husband by the appointment in question, and that this desire was the real motive and object of the appointment, though there was annexed to it a condition in favour of persons not within the power. The appointment is singularly like the hypothetical appointment put in the judgment in *Alexander* v. *Alexander* (6) and quoted at p. 298 of Farwell on Powers, 2nd ed.

(1) Kay, 313.
(2) L. R. 2 H. L. Sc. 482.
(3) 1 D. J. & S. 517; 11 H. L. C. 32.
(4) [1893] 1 Ch. 283.
(5) [1911] 1 Ch. 37.
(6) 2 Ves. Sen. 644.

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It is true that by the codicil the annuities which the husband is to pay to persons who are not objects of the power are largely increased—namely, from 100*l.* to 300*l.*—but the benefit to be retained by the husband is still very substantial. And, having once arrived at the conclusion that the appointment made by the will was genuine in itself, though burdened or charged with objectionable conditions, I do not think that the mere increase of the burden or charge affords any sufficient indication that the testatrix's real intention had changed from an intention to benefit her husband to an intention to benefit other persons through him.

The decisions in *In re Perkins* (1) and *In re Cohen* (2) were strongly pressed on me as governing the present case; but I think that they are entirely distinguishable on the facts. In each of those cases it was found as a fact that the sole object of the appointment was to benefit persons outside the power, and that, apart from such object, the appointment would not have been made.

Solicitors for the plaintiffs and some of the defendants: *Van Sandau & Co.*

Solicitors for the other defendants: *Stow, Preston & Lyttelton.*

(1) [1893] 1 Ch. 283. (2) [1911] 1 Ch. 37.

F. E.

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1914

July 20, 21, 22, 23, 24, 27.

[1913 G. 1401.]

Restraint of Trade—Covenant—Reasonable Protection of Covenantee—Severability of Covenant—Procuring Breach of Covenant—Cause of Action—Damages—Proof of Damage—Damages inferred—General Observations on the Present State of the Law relating to Covenants in Restraint of Trade.

At the date of the covenant hereinafter mentioned the plaintiff Goldsoll carried on business as a dealer in imitation jewellery at 7, Old Bond Street under the name of Tecla, and Terisa, Limited, a company in which the defendant Goldman held substantially all the shares and all the debentures, carried on a similar business at 8, New Bond Street. The plaintiff carried on, or was interested in, similar businesses, under the name of Tecla, in Paris, New York, Vienna, Berlin, and other cities.

In June, 1912, the plaintiff Goldsoll and the defendant Goldman entered into an agreement for the purpose of putting an end to competition between them, whereby Goldman agreed to discontinue the business of the Terisa Company, and not allow the name Terisa to be used in a similar business for two years from October 22, 1912; and covenanted that he would not for the like period "either solely or jointly with or as agent or employé for any other person persons or company directly or indirectly carry on or be engaged concerned or interested in or render services gratuitously or otherwise to the business of a dealer in real or imitation jewellery in the county of London or any part of the United Kingdom of Great Britain and Ireland and the Isle of Man or in France, the United States, Russia, or Spain, or within twenty-five miles of Potsdamerstrasse, Berlin, or St. Stefans Kirche, Vienna."

Goldsoll and the London Tecla Gem Company, Limited, a company to whom Goldsoll had transferred his business, brought this action against Goldman, Sessel, a former manager of the Terisa Company, and S. Sessel & Co., a company under whose name Sessel and his wife had started an imitation jewellery business at 14, New Bond Street, for injunctions against Goldman restraining breaches of his covenant, and against the other defendants restraining them from procuring and inducing such breaches:—

Held, on the facts, that Goldman had committed breaches of his covenant, and the defendants Sessel and S. Sessel & Co. had induced him to break his contract.

Held, also, (1.) that the covenant was not too wide because it extended to real jewellery, though the plaintiff's business was chiefly if not entirely confined to imitation jewellery. (2.) That the covenant was too wide in area unless severable; but that the covenant not to carry on business in the United Kingdom or the Isle of Man was severable from the rest, and was not too wide. (3.) That damages are essential

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to the right of action which a covenantee has against one who induces his covenantor to break his contract, but that there was sufficient evidence of damages. (4.) In a case where the breach which has been procured would in the ordinary course inflict damage on the plaintiff, the plaintiff may succeed without proof of particular damage.

AT the date of the agreement hereinafter mentioned the plaintiff Goldsoll was carrying on the business of a dealer in imitation pearls known as Tecla pearls and other real and imitation jewellery at 7, Old Bond Street, London, under the style of Tecla, and a company called Terisa, Limited, was carrying on the business of dealers in imitation pearls known as Terisa pearls and other real and imitation jewellery at 8, New Bond Street. The defendant Goldman held substantially all the shares in, and the whole of the debentures issued by, Terisa, Limited. This company was in liquidation, and a receiver of its undertaking had been appointed on behalf of the defendant Goldman in his capacity of debenture-holder.

The plaintiff Goldsoll also carried on, or was largely interested in, similar businesses carried on under the name of Tecla, or names of which Tecla formed part, in Paris, New York, Vienna, Berlin, and other parts of the world.

By an agreement under seal dated June 25, 1912, and made between the plaintiff Goldsoll of the one part and the defendant Goldman of the other part, after reciting that the agreement was entered into with a view to merging the interests of the plaintiff Goldsoll and the defendant Goldman, and avoiding mutual competition in the sale of real and imitation jewellery in the United Kingdom and elsewhere, it was agreed that Goldsoll should form a company to which he would transfer his said business carried on at 7, Old Bond Street under the name of Tecla in which the defendant Goldman should take an interest, and the defendant Goldman for that and other valuable considerations entered into the agreement following :—

Clause 3. "The said Joseph Goldman hereby covenants and agrees with the said Frank Joseph Goldsoll and shall also forthwith upon formation separately covenant and agree with Tecla Limited and any other company formed in accordance with the provisions of these presents, that he will not prior to the 31st

day of October 1912 (save so far as it may be necessary for him so to do to realise his interest in Terisa Limited) and for a period of ten years from the 31st day of October 1912 (save so far as the said Joseph Goldman may in accordance with the provisions hereof be interested in the London Tecla business) either solely or jointly with or as agent or employee for any person or persons or company directly or indirectly carry on or be engaged or concerned or interested in or render services (gratuitously or otherwise) to the business of a vendor or dealer in real or imitation jewellery in the county of London, England, Scotland, Ireland, Wales, or any part of the United Kingdom of Great Britain and Ireland and the Isle of Man or in France, the United States of America, Russia, or Spain, or within twenty-five miles of Potsdamerstrasse, Berlin, or St. Stefans Kirche, Vienna."

The defendant Goldman also agreed that he would make himself absolute owner of the Terisa business, cause the assets thereof to be realized in the usual course of business without advertising or holding any sale at reduced prices, and cause the business to be discontinued and prevent the trade mark or name Terisa being used in connection with the sale of or dealing in real or imitation jewellery. The agreement also contained clauses fixing money penalties for breaches of each clause.

By a further agreement dated November 2, 1912, and made between the same parties, it was provided that in the events which had happened the restrictions contained in clause 3 of the first agreement should cease at the expiration of two years from July 7, 1913.

In pursuance of the said agreement a company called the London Tecla Gem Company, Limited, was formed and acquired the said business carried on by the plaintiff Goldsoll, and by an indenture dated December 30, 1912, and made between the Société Tecla, Limited, of the first part, the plaintiff Goldsoll of the second part, and the London Tecla Gem Company, Limited, of the third part, the benefit of the said agreements with Goldman was assigned to the London Tecla Gem Company.

This action was commenced on July 29, 1913, by Goldsoll and the London Tecla Gem Company against Goldman,

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S. Sessel & Co., and J. H. Sessel, alleging that the defendant Goldman had committed breaches of the covenant on his part contained in the first agreement, and that the defendants J. H. Sessel and S. Sessel & Co. had knowingly incited, procured, and induced such breaches, and aided and abetted the violation of the said agreement. J. H. Sessel was the managing director of Terisa, Limited, until the winding-up, and he and his wife had since September, 1912, been carrying on at 14, New Bond Street the business of selling imitation pearls in the name of S. Sessel & Co. The lease of 14, New Bond Street had been taken in the name of Mrs. Sessel, but it was alleged to have been applied for by Goldman. It was further alleged that the business was really Goldman's and that he had, in breach of the agreement, handed over a great part of the stock in trade of Terisa, Limited, to the Sessels without payment, and that letters and customers coming to the old address at 8, New Bond Street were sent on to No. 14 and there supplied with imitation pearls under the name "Terisa," and that Goldman had given the Sessels a register of names of the customers of Terisa, Limited, and certain cards on files containing other such names. It was also alleged that Goldman was interested in the businesses of a dealer in real or imitation jewellery carried on at 5, George Street, Hanover Square, under the name Palmeira Pearl Company, and other like businesses carried on in the neighbourhood under the names of Topaz and Warwick respectively.

The plaintiffs claimed (1.) an injunction restraining Goldman from breaches of his covenant at 14, New Bond Street or 5, George Street, Hanover Square, or elsewhere in the county of London or France; (2.) an injunction restraining the other defendants from procuring, inciting, or inducing the defendant Goldman to violate his covenants; (3.) an injunction against all the defendants using the name Terisa in connection with dealing in real or imitation jewellery; (4.) payment by Goldman of the penal sums fixed by the agreement; (5.) damages against the other defendants.

The defences were that no breach had been committed; that the covenant was too wide because it included real jewellery; too wide in area and not severable; that inciting a covenantor

to break his contract was not actionable unless damages were proved, and there was no proof of damage; that the remedy for such inciting was not an injunction but damages.

Jenkins, K.C., Schwabe, K.C., and *W. E. Vernon*, for the plaintiffs. This is not a case of master and servant but of vendor and purchaser, and in the latter case a covenant in restraint of trade is construed more liberally by the Courts. If the limit of space considered as a whole is too wide it may be severable. Here there are three distinct areas. There is first the county of London or the United Kingdom, which may be treated as one area; secondly, there is France, the United States, Russia, or Spain; and, thirdly, there is the twenty-five mile limit from Berlin or Vienna. The plaintiffs' place of business is in London, and on the evidence the restriction against carrying on the business of a dealer in real or imitation jewellery in the United Kingdom is perfectly reasonable having regard to the fact that they obtain customers from all parts of England, Scotland, and Ireland by means of their advertisements in the daily newspapers, and on the authorities the covenant is severable as to space and not wider than is reasonably necessary for their protection if limited to the United Kingdom. It is submitted that the plaintiffs under clause 3 of the agreement are entitled to an injunction against the defendant Goldman limited to the United Kingdom: *Mallan* v. *May* (1); *Price* v. *Green* (2); *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (3); *Baines* v. *Geary* (4); *Lamson Pneumatic Tube Co.* v. *Phillips* (5); *Davies, Turner & Co.* v. *Lowen* (6); *Bromley* v. *Smith* (7); *Haynes* v. *Doman* (8); *Badische Anilin und Soda Fabrik* v. *Schott, Segner & Co.* (9); *Rousillon* v. *Rousillon* (10); Matthews on Restraint of Trade, p. 94; Halsbury's Laws of England, vol. xxvii. pt. v. p. 572, § 1109. Further, the defendant J. H. Sessel with full knowledge of the terms of the agreement of June, 1912, has wilfully induced the defendant Goldman to break

(1) (1843) 11 M. & W. 653.
(2) (1847) 16 M. & W. 346.
(3) [1894] A. C. 535.
(4) (1887) 35 Ch. D. 154.
(5) (1904) 91 L. T. 363.
(6) (1891) 64 L. T. 655.
(7) [1909] 2 K. B. 235.
(8) [1899] 2 Ch. 13.
(9) [1892] 3 Ch. 447.
(10) (1880) 14 Ch. D. 351.

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that contract to the detriment of the plaintiffs. The defendant Goldman has made over to the defendants Sessel & Co., which is really the business of the defendant J. H. Sessel, the cards and register of customers of the old business of Terisa, Limited, and has in other ways assisted the defendant Sessel. The plaintiffs have suffered damage and are entitled to an injunction and damages against the defendants J. H. Sessel and Sessel & Co. It is not necessary to prove particular damage. It is sufficient if the necessary result of the defendants' acts is to cause damage to the plaintiffs. Here the plaintiffs' business began to fall off from the time that the defendants Sessel & Co. set up the rival business at 14, Old Bond Street: *Allen* v. *Flood* (1); *Lumley* v. *Gye* (2); *Merryweather* v. *Moore* (3); *Lumley* v. *Wagner* (4); *Bowen* v. *Hall* (5); *Quinn* v. *Leathem* (6); Kerr on Injunctions, 5th ed. p. 503.

Rigby Swift, K.C., and *Lincoln Reed*, for the defendant Goldman. The evidence fails to establish any conspiracy between Goldman and J. H. Sessel, or any breach by Goldman of the provisions of the agreement of June, 1912. We do not deny that a covenant may be severable. But Goldsoll at the date of the agreement was only a dealer in artificial stones, and the restriction against carrying on business in real or imitation jewellery is unreasonable and wider than is necessary for the reasonable protection of the plaintiffs, and the limit of space is also too wide. To limit the covenant to the United Kingdom is making a new contract for the plaintiffs: *Mason* v. *Provident Clothing and Supply Co.* (7); *H. Leetham & Sons* v. *Johnstone-White* (8); *Nevanas & Co.* v. *Walker & Foreman.* (9)

Peterson, K.C., and *Droop*, for the defendants S. Sessel & Co. The covenant is too wide not only in area but because it prevents the covenantor trading in any jewellery, real or imitation, whereas the business to be protected is only the dealing in a particular sort of imitation pearls.

(1) [1898] A. C. 1.
(2) (1853) 2 E. & B. 216.
(3) [1892] 2 Ch. 518.
(4) (1852) 1 D. M. & G. 604.
(5) (1881) 6 Q. B. D. 333.
(6) [1901] A. C. 495.
(7) [1913] A. C. 724, 745, 746.
(8) [1907] 1 Ch. 322.
(9) [1914] 1 Ch. 413.

Further the claim against S. Sessel & Co. is for inducing a breach of contract or for conspiracy. Whichever way this is put the remedy is an action for damages, not an injunction.

Pollock on Tort, 9th ed. p. 329, lays it down that "as a rule it is the damage wrongfully done, and not the conspiracy, that is the gist of actions on the case for conspiracy"; that is taken from the judgment of Bowen L.J. in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1) *Quinn* v. *Leathem* (2) was decided on the same principle. The head-note is, "A combination of two or more, without justification or excuse, to injure a man in his trade by inducing his customers or servants to break their contracts with him . . . . is, if it results in damage to him, actionable"; and Lord Lindley in his judgment in the same case says: "The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him." Lord Esher in *Temperton* v. *Russell* (3) states the law in the same way; the House of Lords in *Quinn* v. *Leathem* (4) differed from some part of Lord Esher's judgment, as laying too much stress on malice, but they did not question this statement. The foundation of this right of action is damage done, and here there is no evidence of any damage and the remedy as against S. Sessel & Co. is damages and not an injunction.

Dighton Pollock, for the defendant J. H. Sessel.

Jenkins, K.C., in reply. The inclusion of real jewellery cannot make the covenant too wide; no jeweller deals exclusively in imitation jewellery, and very few, if any, exclusively in real.

The cases of *National Phonograph Co.* v. *Edison-Bell Consolidated Phonograph Co.* (5), *Exchange Telegraph Co.* v. *Gregory & Co.* (6), and *Quinn* v. *Leathem* (4) shew that it is not necessary to prove special damages in a case of wrongful interference with contractual right, and that the Court will grant an injunction. Damage will be inferred in a clear case such as we have here. He also referred to Addison on Torts, 8th ed. p. 7.

Cur. adv. vult.

(1) (1889) 23 Q. B. D. 598, 616.
(2) [1901] A. C. 495, 535.
(3) [1893] 1 Q. B. 715, 729.
(4) [1901] A. C. 495.
(5) [1908] 1 Ch. 335.
(6) [1896] 1 Q. B. 147.

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July 27. NEVILLE J. Before dealing with the particular case before me, I wish, having had once more to go into the cases, to say something on this branch of the general law.

A question has been raised as to the incidence of the burden of proof in actions upon covenants in restraint of trade. Cases have been cited in which contradictory views seem to have been expressed, and I desire therefore to state my own opinion on the point. In the first place, let me point out that the question of reasonableness is for the Court and, in the absence of evidence on either side, the Court would not necessarily decide in favour of the plaintiff or in favour of the defendant. The nature of the contract itself may be such as to justify the Court in drawing an inference of reasonableness or unreasonableness in the absence of evidence. For instance, if a London shopkeeper sued upon a covenant restricting the covenantor from carrying on a similar business within a quarter of a mile of and in the same street as the shop of the covenantee, I should have little difficulty, in the absence of evidence to the contrary, in holding that the restriction was reasonable, while were the restriction under such circumstances to extend to the whole of the United Kingdom, I should, in the absence of evidence, hold without hesitation that the restriction was unreasonable. In the first of these cases, therefore, the burden of proof would fall upon the defendant the covenantor; in the second upon the plaintiff the covenantee. There are, however, no doubt many cases in which unassisted by evidence the Court would find it difficult, if not impossible, to draw any inference as to reasonableness at all. With whom lies the burden of proof in such cases? The answer to this question, in my opinion, depends upon what the true proposition of the law on contracts in restraint of trade may be. If it be that covenants which restrain trade to an unreasonable extent are void, then I think the burden would lie with the covenantor to shew that the covenant did so unreasonably operate. If, on the other hand, the true proposition be that covenants in restraint of trade are void with an exception in favour of covenants which do not restrain it to an unreasonable extent, then I think that the burden would be with the covenantee. In my opinion, the latter proposition is the correct one. Consequently, if the plaintiff sues

upon a contract in restraint of trade which does not on the face of it appear to the Court reasonable and the plaintiff calls no evidence, judgment should be given for the defendant: see on this point *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (1)

When is a covenant in restraint of trade reasonable? By the common law of England, contracts in restraint of trade were void, and this is, in my opinion, still the law subject to the exception which has been grafted upon it. The exception dates from a comparatively early period. The reason for the common law rule is not far to seek. Such contracts were held to be contrary to public policy because it was considered to be in the interest of the community that every man should be entitled to carry on his lawful business or exercise his lawful calling without restraint. I believe the origin of the exception to the general rule arose from the consideration that the community was not interested in the question of where a man exercised his calling, and therefore, if abundant opportunity for so doing were left, the community was not injuriously affected by a man contracting not to do so within a limited area, but it was held to be unreasonable that a man should be prevented from exercising his calling even in a limited area if no advantage thereby accrued to the other party to the contract. Consequently, although the area prohibited were of small extent, yet if it was more than necessary to protect the business of the latter it would be void. Now in earlier days the ambit of any business was never large enough to cause its protection to limit unreasonably a man's opportunities outside; and consequently the protection of the covenantee proved a satisfactory test of whether the excluded area was unreasonably large. In my opinion the exception itself was contrary to sound principle. When contracts are treated as contrary to public policy it is because their tendency is injurious, and in such cases it has not, I think, been the practice of the Courts to examine the circumstances of each case which offends against the rule and consider whether substantial injury to the public interest has arisen or is likely to arise from the contract under consideration. The

(1) [1894] A. C. 535.

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infringement of the rule has been considered fatal to the contract although it might be capable of proof that under the particular contract no injury to the public could arise. But when we come to the consideration of the character of the exception in question as ultimately established, the departure from principle is, to my mind, startlingly apparent. Since the decision of *Rousillon* v. *Rousillon* (1), and possibly before that, the only test of reasonableness has been whether the restriction goes beyond what is reasonably required for the protection of the business of the covenantee. If so, it is void; if not, it is good whatever the result may be to the public and the covenantor. I confess this seems to me a strange inversion of the original rule which, so far from considering only the convenience of the covenantee, regarded only the mischief occasioned to the public by hindering a man from making his living and adding to the wealth of the State by the exercise of his calling. Faint echoes of the original principle are still occasionally heard in the Courts, notably in the speech of the late Lord Macnaghten in the case of *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (2) above referred to. But that such dim recollections of the original principle have no practical bearing upon the decision of the cases is shewn by the fact that in that case a man of genius was restrained from turning his special talents to account in any country in any part of the world, and as the result of the, to my mind, curious process of reasoning in the cases to which I have in general terms referred, this was held to be no injury to the public. I sit here merely to administer the law as I find it, and I am aware that the decisions are too precise and numerous to permit of any reconsideration by the Courts, but I have thought it my duty to say what I have done because, in my humble opinion, the whole of the law in this particular matter is a blot upon what I consider to be in other respects an admirable system of jurisprudence and in the hope that the attention of the Legislature may ultimately be called to the matter. During my connection with the law I have seen more undeserved suffering inflicted by this branch of it than by all the rest put together. I am aware that the question is a thorny one, but there are two comparatively small amendments of the

(1) 14 Ch. D. 351. (2) [1894] A. C. 535.

law which I think would go far to remedy what at present I consider its harshness. Men in want of employment, or, to a less degree, in want of money, are very likely to be induced to sign any document to get it, and there are cases where men on a few shillings a week, for which they give ample consideration in other ways, are induced to sign contracts which make it exceedingly difficult for them to obtain employment elsewhere, and I think it might well be left to the discretion of the Court to refuse an injunction in cases which it considers harsh. In most of such cases the damage caused by the breach of contract is either nil or quite inconsiderable. Again I think that the application of the doctrine of severability of the terms of a contract in restraint of trade has proved mischievous. It seems to me to be in accordance both with principle and justice that if a man seeks to restrain another from exercising his lawful calling to an extent which the law, even as it now stands, deems unreasonable, the contract by which he does so, whether grammatically severable or not, should be held to be void in toto. To hold otherwise seems to me to expose the covenantor to the almost inevitable risk of litigation which in nine cases out of ten he is very ill able to afford, should he venture to act upon his own opinion as to how far the restraint upon him would be held by the Court to be reasonable, while it may give the covenantee the full benefit of unreasonable provisions if the covenantor is unable to face litigation.

It must not be supposed that all I have said about the general tendency of the law as it stands is applicable to the facts of the particular case to which it has now to be applied. [His Lordship then examined the evidence and continued:]

I hold upon the facts that Mr. Goldman presented Mr. Sessel with the balance of the stock of the Terisa business which had to be disposed of by a particular day, and the greater part of which had been sold before closing the business down. I think that he also gave him the right to use and indeed put him into possession of the names of the Terisa customers contained on cards which were kept on a file and in a register, both of which have been traced to the possession and are still in the possession of the person, whoever he may be, who is carrying on the business at 14, New

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Bond Street. I have also come to the conclusion that in some cases at all events letters which were delivered at 8, New Bond Street, which were the former premises of the Terisa Company, were either given or forwarded to the persons carrying on the pearl business at No. 14, New Bond Street.

It appears to me therefore that, although I cannot say that it has been proved that Mr. Goldman has a direct interest in the business, or what that interest may be, I have evidence which is clear beyond doubt that he has rendered services to the business which has been carried on there, and consequently I think that the plaintiffs with regard to Mr. Goldman are entitled to an injunction, if the contract relied on is a contract which is in part good and not void under the general principle to which I have referred in respect of covenants in restraint of trade.

In my opinion, the extension of the covenant to the business of a vendor or dealer in real or imitation jewellery is not too wide. I think that such a covenant was only reasonably necessary for the protection of Mr. Goldsoll, having regard to the character of the business, from a rivalry in respect of which he was seeking to protect himself. With regard to the area which is described in clause 3 of the agreement, it is, to my mind, beyond question too wide if you take it as a whole, and therefore I have to consider if it is a case in which one part of the covenant can be severed from another so as to give effect to that part which does not infringe against the common law rule with regard to such covenants. In my opinion, it is severable and it is severable with regard to one part, the county of London, England, Scotland, Ireland or Wales, or any part of the United Kingdom of Great Britain and Ireland and the Isle of Man. I do not see my way to cut that area up in any way. I must take it as a whole. The question then is, Is that too wide for the protection of the covenantee? In my opinion, it is not. This is a case in which the custom is acquired in the main by means of advertisements in the English illustrated papers, and I think it is a matter of notoriety that these papers do penetrate throughout the whole of the United Kingdom and even into so remote a district as the Isle of Man. I think therefore that there is no ground for saying that that limitation is a

limitation in excess of what is necessary for the reasonable protection of the trade of the covenantee. With regard to the defendant Goldman, therefore, what I have said already shews that the plaintiffs are entitled to succeed against him.

Now comes a very much more difficult question, and a question with which the Courts have much less often to deal, about damages in such a case for breach of contract. It is said that Mr. Sessel incited and procured Mr. Goldman to break the contract that I have referred to, with the contents of which Mr. Sessel was aware. In my opinion, Mr. Sessel was fully aware of the terms of the contract made between Mr. Goldsoll and Mr. Goldman, and I also think that in obtaining from Mr. Goldman the names of the customers, the name cards and the register, he was inducing Mr. Goldman to do what he perfectly well knew Mr. Goldman was not entitled to do, and therefore I think he has committed an actionable wrong to the plaintiffs subject to one question, and that is the question of damages. I must say the cases are not very clear upon the point, but in my opinion it is one of those cases in which damages are essential to the right of action by the covenantee against one who has induced his covenantor to break the contract with him. But in this case there is evidence of damage which I think sufficient, and in addition to that I think authorities which bind me—notably the case of *Exchange Telegraph Co.* v. *Gregory & Co.* (1)—shew that in such a case the damage may be inferred, that is to say, that if the breach which has been procured by the defendant has been such as must in the ordinary course of business inflict damage upon the plaintiff, then the plaintiff may succeed without proof of any particular damage which has been occasioned him.

Now in the present case it seems to me clear that there must have been damage done to the plaintiffs by the carrying on of this rival business of precisely the same nature in the immediate proximity of the plaintiffs' place of business. How many orders were lost to the plaintiffs, or whether all the orders obtained by the defendant Sessel were orders which were going or which ultimately would have gone to Tecla, it is impossible of course for anybody to say, but here the main object of the plaintiffs was

(1) [1896] 1 Q. B. 147.

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to put an end to the rivalry of a similar establishment in their vicinity, and that object has been certainly to some extent and probably to a considerable extent defeated by the fact that the names of the customers of the rival firm and orders received in the rival firm have been communicated to a new rival establishment, which, I think, certainly with the connivance of Mr. Goldman and in full knowledge that such connivance was a breach of Mr. Goldman's covenant, has been started by the defendant Sessel. It does not seem to me necessary at the present time to decide who are the owners of the business at 14, New Bond Street, but I will say this, that I am far from satisfied that Mrs. Sessel is any more than a mere nominee of the defendant Joseph Sessel.

I think therefore in the present case I ought to grant an injunction, and the injunction that I propose to grant will follow the terms of the covenant contained in the latter part of clause 3 of the agreement so far as Mr. Goldman is concerned.

With regard to the relief against the defendant Sessel, I have been asked by the plaintiffs to assess the damages. The evidence of damage is of a somewhat general character, and I do not pretend that I am in a position with the smallest approach to accuracy to estimate what the damages are that may have been caused, but I feel no fear that I am exceeding the amount of the actual damage caused to the plaintiffs when I give the damages at 10*l*. Therefore I give those damages against the defendants Sessel and Sessel & Co., and I restrain them from making further use of the name cards and the register disclosing the customers of the old Terisa business and from procuring the defendant Goldman to commit any breach of the covenant he entered into, and I will give the costs of the action against the defendants generally except so far as the costs have been increased by the claims in respect of the businesses carried on under the names of Palmeira, Topaz, and Warwick.

Solicitors: *J. R. Cardew Smith; W. B. Glasier; Beardall & Co.*

J. R. B.

In re LAW GUARANTEE TRUST AND ACCIDENT SOCIETY, LIMITED.

LIVERPOOL MORTGAGE INSURANCE COMPANY'S CASE.

C. A.
1914
May 25, 26, 27, 28; *June* 29.

[00422 of 1909.]

Insurance of Debentures—Re-insurance—Contract of Indemnity—Liquidation—Scheme of Arrangement—Limit of Liability of Re-insurer.

A company issued debentures in each of which it promised to pay 100*l.* on August 30, 1910, or upon such earlier day as the principal sum should become payable in accordance with the conditions indorsed thereon, and to pay interest in the meantime. Under the conditions the principal sum became payable on the happening of any one of certain events, as, for instance, default in payment of interest or the winding up of the company.

A guarantee society by a policy printed at the foot of each debenture guaranteed to the registered holder thereof payment of the principal sum to become due under the debenture in manner following, namely, if the company made default in payment of the principal sum or any part thereof the society would pay the amount thereof upon whichever of the days following should first happen, namely, on August 30, 1910, or on the day after the securities for the debenture-holders should have been enforced and completely realized and distributed. Subsequently the guarantee society entered into a contract with a mortgage insurance company whereby the latter in consideration of a yearly premium guaranteed the society to the extent of two-elevenths of the risk insured by the society under their policy, and the like proportion of all costs and expenses incurred by the society with the consent of the mortgage insurance company in respect of any claim arising under the policy. Default was made in payment of the debentures, and in 1909 the society entered into possession of the debenture-holders' securities. Shortly afterwards the society went into liquidation, and after the debenture-holders' securities had been realized and the proceeds distributed there remained a deficiency due to them of 4988*l.* :—

Held, that the contract between the society and the mortgage insurance company was a contract of insurance, and that the company was liable to pay to the liquidator of the society two-elevenths of the deficiency of 4988*l.*, and not merely two-elevenths of the dividend payable by the society to the debenture-holders upon that deficiency.

Held, further, that even if the contract was a contract of indemnity

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the mortgage insurance company would still be liable to the liquidator for two-elevenths of the deficiency.

In re Richardson [1911] 2 K. B. 705 discussed.

Decision of Neville J. [1913] 2 Ch. 604 reversed.

APPEAL from an order of Neville J. (1)

On August 30, 1900, Sands, Wilson & Company (1900), Limited, issued a series of 275 debentures of the company of 100*l.* each. In each debenture they promised to pay to the registered holder thereof the principal sum of 100*l.* upon August 30, 1910, or upon such earlier day as it might become payable in accordance with the conditions indorsed thereon, and until payment of such principal money to pay to the debenture-holder interest thereon at the rate of 4*l.* 10*s.* per cent. per annum by half-yearly instalments on February 28 and August 30 in each year. Condition 1 indorsed on the debenture stated that the debenture-holders were entitled to the benefit of the provisions of an indenture of even date whereby certain property of the company therein described was vested in the Law Guarantee and Trust Society as trustees for the debenture-holders for further securing the payment of the principal moneys and interest payable in respect of the debentures. By condition 4, "The principal moneys hereby secured shall in each of the events following become immediately payable:—(*a*) When default shall have been made in the payment of any interest owing in respect of this debenture for three calendar months after the same shall become due, and before payment of such interest notice in writing shall have been given to the company by the debenture-holder requiring payment. (*b*) When an order shall be made by any competent Court or an effective resolution shall be passed by the company for winding up the company. (*c*) When the company shall have given six months' notice under condition 15 to repay the principal money hereby secured, and such six months shall have expired. (*d*) When this debenture shall have been drawn for redemption as provided by the said indenture, and three calendar months from such drawings shall have elapsed. (*e*) When the security constituted by the said indenture shall have become enforceable, and the

(1) [1913] 2 Ch. 604.

trustee of such indenture shall have determined or become bound to enforce the same, and shall by notice in writing to the company have declared that on behalf of the debenture holders the trustee calls for payment thereof." Condition 15 gave the company the right at any time to pay off the debenture with a bonus of 5*l.* upon giving six calendar months' notice.

The Law Guarantee Trust and Accident Society in the ordinary course of its business guaranteed the payment of the principal and interest to become due under the above debentures. The guarantee was contained in the following document, which was printed at the foot of each debenture:—

"The Law Guarantee and Trust Society Limited (hereinafter called the society) acknowledges that the above debenture was subscribed for on condition and in part consideration that the society would give the guarantee following, and accordingly the society hereby guarantees to the registered holder of the above debenture . . . . the payment of the principal moneys and interest but not bonus to become due under the said debenture in manner following, that is to say:—

"1. As to the interest. If and whenever the company makes default in the payment of any interest for more than thirty days, the society will pay such interest on demand.

"2. As to principal. If the company makes default in the payment of the principal moneys, or any part thereof, the society will pay the amount thereof upon whichever of the days following shall first happen, viz.:—(*a*) on the 30th day of August, 1910, above mentioned or (*b*) on the day after the securities for the debenture-holders of the series to which the above debenture belongs shall have been enforced and completely realised and distributed so far as regards the holder of the above debenture.

"3. At any time after the company shall have made default for more than fourteen days in the payment of any of the said principal moneys or interest the society may by notice in writing to the debenture-holder call on him to transfer to the society the above debenture and all his rights thereunder, and the debenture-holder shall be bound to comply with such demand on payment of the full amount of the principal moneys and interest then owing in respect of such debenture.

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"4. If the company makes default for more than thirty days in the payment of any principal moneys or interest secured by the above debenture, the debenture-holder must give notice in writing of such default to the society as to interest, within six calendar months after the default, and as to principal within twelve calendar months after the default."

On March 23, 1904, the society made a contract with the Liverpool Mortgage Insurance Company, which was indorsed on a specimen debenture containing terms identical with those of the guaranteed debentures, and was as follows:—

"Memorandum.

"Premium	£25	0	0
"Single „	109	16	7

"The Liverpool Mortgage Insurance Company, Limited (hereinafter called 'the guarantors') hereby guarantee the within named Law Guarantee and Trust Society, Limited (hereinafter called 'the society'), to the extent of 5000*l.* being two-elevenths of the risk assured by, and subject to, the conditions of the within policy of debenture insurance, and also the like proportion of all costs and expenses incurred by the society with the consent of the guarantors in respect of any claim arising under the within policy or in relation to the enforcement with the like consent of the society's powers as transferees of the debentures so long as the annual premium of 25*l.* shall be paid on the 30th day of August in each year, or within thirty days hereafter."

Sands, Wilson & Co. made default in the payment of their debentures, and in September, 1909, the society entered into possession of the property of that company in exercise of the powers contained in the trust deed. On December 13, 1909, an extraordinary resolution was passed for the voluntary winding up of the society, a supervision order was made on December 14, 1909, and on July 28, 1910, a scheme of arrangement was sanctioned by Neville J. under s. 120 of the Companies (Consolidation) Act, 1908. By this scheme the payment of all claims was postponed until December 31, 1918, but the payment of interest at the rate of 3 per cent. per annum until that date upon

claims proved and admitted was provided for, and it was further provided that on payment of a final dividend in the winding-up the holders of debentures guaranteed by the society should release the society from all claims. The clauses of the scheme which affected re-insurers are set out below. (1)

The Liverpool Mortgage Insurance Company had elected to be bound by the scheme.

The assets of Sands, Wilson & Co. had been completely realized, and the total deficiency for which the debenture-holders in that company were entitled to prove in the society's liquidation was 4988*l.* 6*s.* 11*d.*, being at the rate of 26*l.* 5*s.* 1*d.* per 100*l.* debenture, and each debenture-holder had lodged a proof for that amount in the liquidation of the society, and the proofs had been admitted. The liquidators of the society thereupon made a claim against the Liverpool Company upon the policy of re-insurance for two-elevenths of 4988*l.* 6*s.* 11*d.*, which with certain other small payments amounted to 988*l.* 17*s.* 1*d.*

A summons was taken out in the society's liquidation by the liquidators for a declaration that payment in full by the society in respect of liabilities incurred on policies or guarantees was not a condition precedent to the liability of the Liverpool Company on re-insurances by them of the same risks, and that such liability of the Liverpool Company was not limited by or

(1) "22. The liquidators to have power to enter into and carry into effect any compromise or arrangement with any of the creditors or with any committee of debenture-holders (whether involving the payment of moneys under clause 2 hereof or not) with the consent of the creditors' committee of inspection or the sanction of the Court. The liquidators also to have power with the like consent or sanction to advance moneys for any purpose which may appear to assist in or be conducive to the beneficial realisation of the society's assets.

"23. The liquidators to be at liberty to deal with all re-insurers of risks undertaken by the society by offering them an option (to be exercised within such reasonable time as the liquidators shall appoint) either to have their liabilities in respect of re-assurances estimated as if this scheme of arrangement had not become binding and the assured had proved for the contingent liabilities of the society pursuant to section 206 of the Companies (Consolidation) Act 1908 on or before the 31st December 1910 or to be bound by the scheme in all respects and accordingly to have their liabilities in respect of re-assurances ascertained on the footing of the claims of the assured made and allowed under this scheme being treated as the amount payable under the policies re-insured."

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proportional to the amount of the dividend paid or to be paid by the society to the persons entitled to such policies or guarantees; and further or in the alternative for a declaration that in respect of the risk undertaken by the society on guarantees to the holders of debentures in Sands, Wilson & Co., re-insured by the Liverpool Company as to two-elevenths of such risk, the Liverpool Company were or would become liable to pay to the liquidators of the society the sum of 988*l.* 17*s.* 1*d.* The case of Sands, Wilson & Co. was taken as a test case to decide the liability of the Liverpool Company upon other re-insurances, and also of other re-insurers of the society's guarantees.

Neville J. held that payment by the society of the liabilities incurred under policies or guarantees was not a condition precedent to the liability of the Liverpool Company on re-insurances by them of the same risks, but that the ultimate liability of the Liverpool Company under such re-insurances was limited to the proportional amount of the dividend and other sums paid or to be paid by the society to the persons entitled to such policies or guarantees, and that any sum in excess of such proportional amount paid by the Liverpool Company to the society in respect of such re-insurances would be held by the liquidators on behalf of the company. (1)

Subsequently the liquidators of the society took out a summons, which was heard before Warrington J. for Neville J., for a declaration that the Liverpool Company might properly be required by the liquidators to pay directly to the persons entitled to policies or guarantees issued or given by the society the proportion of the loss on the same policies or guarantees re-insured by the company. Warrington J. refused to make the declaration, upon the ground that the declaration claimed was inconsistent with the above order of Neville J.: see [1914] W. N. 117.

The Law Guarantee Trust and Accident Society appealed, and by their notice of appeal they asked:

(*a*) That the order of Neville J. should be discharged, and that in lieu thereof the following declarations might be made:—(1.) A declaration that payment in full by the society in respect

(1) [1913] 2 Ch. 604.

of liabilities incurred on policies or guarantees was not a condition precedent to the liability of the Liverpool Mortgage Insurance Company on re-insurances by them of the same risks; and that such liability of the Liverpool Company was not limited by or proportional to the amount of the dividend paid or to be paid by the society to the persons entitled to such policies or guarantees. And further or in the alternative, (2.) a declaration that in respect of the risk undertaken by the society on guarantees to the holders of debentures in Sands, Wilson & Co. re-insured by the Liverpool Company as to the two-elevenths of such risk the Liverpool Company were or would become liable to pay to the liquidators of the society the sum of 988*l.* 17*s.* 1*d.*

(*b*) In the alternative, if the order of Neville J. should be affirmed, then that the order of Warrington J. might be discharged or varied, and that a declaration might be made and added by way of supplement to the order of Neville J. as follows, namely, (3.) a declaration that the Liverpool Company were or would become liable to repay to the liquidators of the society in respect of risks undertaken by the society on policies or guarantees issued or given by the society and re-insured by the Liverpool Company the full amounts actually paid or to be paid by the society to the persons entitled to such policies or guarantees under the scheme of arrangement in the winding up of the society, provided that the respective sums so payable by the Liverpool Company should not exceed the respective amounts for which they should have undertaken to re-insure the society. Or in the alternative, if it should be held that no one of the three above-mentioned declarations ought to be made, then (4.) a declaration that the Liverpool Company might properly be required by the liquidators of the society to pay directly to the persons entitled to such policies or guarantees as aforesaid the proportion of the loss on the same policies or guarantees re-insured by the Liverpool Company.

Younger, K.C., and *Maugham, K.C.* (*W. A. Greene* with them), for the appellants. The question for determination is whether the Liverpool Mortgage Insurance Company, who have assumed a substantial portion of the society's liability under their

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insurance of the debentures, are liable to pay two-elevenths of the sum which the society are liable to pay on the original insurance, or only two-elevenths of the dividend which the society may pay on that sum. The appellants contend that the former is the true proposition. It is the ordinary case of an insurance and a re-insurance, and the re-insurers are bound to pay as soon as the amount of the liability of the insurers is ascertained. There is no privity of contract between the Liverpool Company and the debenture-holders. The contract between the debenture-holders and the society is a contract of insurance. The subsequent contract between the society and the Liverpool Company is a contract by the latter company to re-insure a portion of the liability of the society under the first insurance. It is not a mere contract of indemnity, as Neville J. thought. The events on which and the times at which the money becomes payable are not the same in the two policies, nor is the sum payable the same. The risk re-insured was the possibility of Sands, Wilson & Co. making default in payment of the sums due under the debentures, and the Liverpool Company re-insured that risk to the extent of two-elevenths of the ascertained loss. The loss has been ascertained at 4988*l.* 6*s.* 11*d.*, and therefore the Liverpool Company are liable to pay two-elevenths of that sum. The risk re-insured is not measured by the ability of the society to pay the sum which may become due under the original policy, but by their liability to pay. The society will hold any sum which they may receive from the Liverpool Company for their creditors generally, and the debenture-holders will prove in the liquidation and receive a dividend from the society on their claims. The premium payable to the Liverpool Company for re-insurance had reference to the capacity of Sands, Wilson & Co. to pay their debentures, and had no reference to the ability of the society to pay, and yet if the order of Neville J. is right the more insolvent the society are the less the Liverpool Company will have to pay under their policy of re-insurance. This is a contract of insurance against a certain event happening: *Dane* v. *Mortgage Insurance Corporation* (1); *Finlay* v. *Mexican*

(1) [1894] 1 Q. B. 54.

Investment Corporation (1); *Shaw* v. *Royce* (2); and the re-insurer must pay though the re-assured has paid nothing to the original assured, the contract of re-insurance being a separate contract distinct from the original insurance: *In re Eddystone Marine Insurance Co.* (3); Arnould on Marine Insurance, 8th ed., pp. 421, 422; *Herckenrath* v. *American Mutual Insurance Co.* (4); *Nelson* v. *Empress Assurance Corporation.* (5) This last case shews that the contract of re-insurance is not a contract of indemnity so as to entitle the insurer under the original policy to bring in as a third party under Order xvi., r. 48, the insurer under the policy of re-insurance. A contract of insurance can be put in the language of a guarantee, and in order to see what the contract is all the surrounding circumstances must be looked at. In *Seaton* v. *Heath* (6) Romer L.J. said that there was no magic in the word "insurance" or "guarantee." In *Law Guarantee Trust and Accident Society* v. *Munich Re-insurance Co.* (7) Warrington J. treated a contract similar to this as a contract of re-insurance. The contract is therefore one of re-insurance strictly so called, and not one of indemnity, and the Liverpool Company are liable for two-elevenths of 4988*l.* 6*s.* 11*d.* [*Home Insurance Co. of New York* v. *Victoria-Montreal Fire Insurance Co.* (8) was also referred to.]

Even, however, if the first contract is one of suretyship and the second contract one of indemnity, the contract by the Liverpool Company is to pay to the society a sum of money without any reference to the question as to how the society will dispose of it. The time for payment (apart from the moratorium allowed by the scheme) has arrived and the sum has been ascertained. The Liverpool Company is therefore liable to pay that amount: *Carr* v. *Roberts* (9); *Ashdown* v. *Ingamells* (10); *Cruse* v. *Paine* (11); *In re Perkins* (12); *In re Denton's*

(1) [1897] 1 Q. B. 517.
(2) [1911] 1 Ch. 138.
(3) [1892] 2 Ch. 423.
(4) (1848) 3 Barb. Ch. N. Y. 63.
(5) [1905] 2 K. B. 281.
(6) [1899] 1 Q. B. 782, 792.
(7) [1912] 1 Ch. 138.
(8) [1907] A. C. 59.
(9) (1833) 5 B. & Ad. 78.
(10) (1880) 5 Ex. D. 280.
(11) (1868) L. R. 6 Eq. 641; (1869) 4 Ch. 441.
(12) [1898] 2 Ch. 182.

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Estate (1); *Lacey* v. *Hill* (2); *Wolmershausen* v. *Gullick.* (3) In this last case Wright J. cited with approval a passage from Lindley on Partnership, 5th ed., p. 375, 8th ed., p. 438, where, speaking of contribution and indemnity, the learned author says that "the limit of the defendant's liability to the plaintiff is the full amount for which he is liable; or if he is dead or insolvent the full amount provable against his estate, and not only the amount of dividend which such estate can pay." Therefore, even if it is a contract of indemnity, the Liverpool Company must pay the full amount for which the society are liable to the debenture-holders, and not merely the dividend which the society may pay. The case of *In re Richardson* (4) seems to create a difficulty, but the facts there were very peculiar, and the decision turned upon the relation of trustee and cestui que trust, and is no authority for the proposition that a person who is liable to indemnify another is only liable for the dividend which that other may pay to the principal creditor. [*In re Northern Counties of England Fire Insurance Co.* (5) was also referred to.]

[SCRUTTON J. referred to *Castellain* v. *Preston.* (6)]

Tomlin, K.C., and *Dighton Pollock*, for the Liverpool Mortgage Insurance Company. The claim of the appellants is that they shall be put in a better position than if they had never incurred the liability as to two-elevenths of the risk which they re-insured. The word "insurance" does not imply any defined legal characteristic. There are life, fire, marine, and various other insurances, and they each have different characteristics. For instance, life insurance is not a contract of indemnity. It is a promise to pay a certain sum on the happening of an event, provided that the assured has an interest in the life insured. "Insurance" has no definite legal meaning. Its meaning depends upon the document constituting the bargain. The contract in this case is a contract of indemnity. The Liverpool Company have undertaken to indemnify the Law

(1) [1903] 2 Ch. 670; [1904] 2 Ch. 178.
(2) (1874) L. R. 18 Eq. 182, 191.
(3) [1893] 2 Ch. 514, 527, 528.
(4) [1911] 2 K. B. 705.
(5) (1880) 17 Ch. D. 337.
(6) (1883) 11 Q. B. D. 380, 397.

Guarantee Trust and Accident Society against a certain portion of the sum which the latter may have to pay to the debenture-holders in Sands, Wilson & Co. By paying a premium the society have purchased an obligation on the part of the Liverpool Company, and what that obligation is must be determined when the time for payment arrives. A contract of indemnity is a contract to keep a person free from loss under a liability which the person indemnified has undertaken. At law the remedy upon a contract of indemnity is to sue for damages for breach of the contract, and there is no breach until the person indemnified has paid upon the original contract. Where, however, the danger to the person indemnified is imminent, equity will grant specific performance of the contract to indemnify without waiting until that person has paid the original creditor; otherwise he would be exposed to the danger of being unable to pay and therefore being unable to sue at law upon the contract to indemnify. The declaration made by the Court is set out in *Evans* v. *Wood* (1) and *Cruse* v. *Paine*. (2) A covenant to indemnify is different from a covenant to pay a sum of money on the happening of an event. In *Carr* v. *Roberts* (3), *Ashdown* v. *Ingamells* (4), and *In re Perkins* (5) there was both an agreement to indemnify and an agreement to pay a sum of money on an event. In the present case the original tripartite contract was, as regards the Law Guarantee Trust and Accident Society, a contract in the nature of suretyship, to which the law attaches the obligations of suretyship; it is called a "guarantee." The fact that the money may be payable at a different time from that at which it is payable under the principal contract between Sands, Wilson & Co. and the debenture-holders does not make it the less a contract of suretyship. It is a collateral security for the debt due to the debenture-holders. The debentures were subscribed for on the faith of the guarantee of the society. The second contract to which the Liverpool Mortgage Insurance Company are parties is a contract to hold the society harmless against two-elevenths of any sum the latter may have to pay

(1) (1867) L. R. 5 Eq. 9, 15.
(2) L. R. 4 Ch. 441, 444.
(3) 5 B. & Ad. 78.
(4) 5 Ex. D. 280.
(5) [1898] 2 Ch. 182.

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under the first contract. The "risk assured" under the second contract is the happening of the event on which the society have to pay under the first contract. It is the risk of loss, and the subsequent words as to costs and expenses bear the same meaning. The nature of the transaction embodied in the second contract is that the society are to be placed in the same position as to two-elevenths of the original risk, as if they had never entered into the first contract. The Liverpool Company are therefore only liable to pay the amount of the dividend which may be payable by the society to the debenture-holders in the winding-up. A policy of marine re-insurance stands on a different footing. It is an independent contract: *In re Eddystone Marine Insurance Co.* (1) Under the society's scheme, to which the Liverpool Company have assented, the assets of the company are to be collected until December 31, 1918, and then distributed, and the amount of the dividend which the society may then pay on their debts is the measure of the loss against which the Liverpool Company have agreed to indemnify them. [*Uzielli* v. *Boston Marine Insurance Co.* (2) was also referred to.]

Younger, *K.C.*, in reply.

Cur. adv. vult.

June 29. BUCKLEY L.J. read the following judgment:—The question for decision may be tersely expressed thus: Are the respondent company liable to pay to the liquidator of the appellant society two-elevenths of the liability of the society or two-elevenths of the ability of the society to meet that liability? The appellants say the former. The respondents say the latter. The liability of the society is a liability to a sum of 4988*l.* 6*s.* 11*d.*, for which the proof of the debenture-holders of Sands, Wilson & Co. has been admitted in the liquidation of the society. Are the company liable to pay to the liquidator of the society two-elevenths of 4988*l.* 6*s.* 11*d.*, or to pay (say) 10*s.* in the pound on that sum, being the dividend which the estate of the society can pay? The answer to this question is to be found upon an examination of two contracts in order to ascertain, first, their true construction, and, secondly, their legal effect.

(1) [1892] 2 Ch. 423. (2) (1884) 15 Q. B. D. 11.

The first contract is tripartite. The parties to it are the debenture-holders, Sands, Wilson & Co., Limited, and the Law Guarantee Society, whom I call the society. The debenture-holder advanced his money upon the terms that he should be entitled to such liability of Sands, Wilson & Co., Limited, as is contained in the debenture and in a certain debenture trust deed, and to such liability of the Law Guarantee Society as is found in the instrument appended to the debenture whereby the society guaranteed the debenture-holder in manner therein expressed. The obligations of Sands, Wilson & Co. under the debenture are to pay 100*l.* in 1910, or at the expiration of six calendar months' notice given by the company to the debenture-holder (in which case a bonus of 5*l.* is to be paid), or when the debenture is drawn for redemption, or upon a certain default in payment of interest, or upon the winding up of the company, or when the security stated by the debenture trust deed shall have become enforceable and a certain notice shall have been given.

The obligation of the Law Guarantee Society to the debenture-holder is that if Sands, Wilson & Co. make default the society will make a certain payment (*a*) in 1910, or (*b*) on the day after the mortgaged properties have been realized and the proceeds distributed. The obligation of the society (except in one event to be presently mentioned) is not an obligation (*a*) to pay the same sum, nor (*b*) at the same time, nor (*c*) in the same event as Sands, Wilson & Co. are liable to pay. For instance, suppose that default is made for three months in payment of interest but that the mortgaged properties are not realized, the obligation of Sands, Wilson & Co. is to pay at once, but there is no obligation in the society to pay until 1910. The same is true of each of the other obligations. The only case in which the obligation is the same is that of the debentures running until 1910 and the debenture debt becoming then payable for the first time. The obligation of Sands, Wilson & Co. is to pay the debenture-holder in an event or at a date £*x*: the obligation of the society is to pay the debenture-holder in another event and at another date £*y*. This is true in every case except that of the debenture running to maturity in 1910. If default is made and the mortgaged

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properties are realized, the liability of the society is only to pay the differential sum left undischarged by the distribution of the proceeds of sale of the mortgaged properties. It is, therefore, an obligation to pay a different sum at a different time to the sum and the time at which Sands, Wilson & Co. are liable to make payment. All these considerations point to an independent obligation in respect of a new debt rather than to a suretyship for the original debt. The respondents argue that the obligation is one collateral to the principal debt, and that no doubt is the case. But it is not every collateral obligation which is an obligation of suretyship. On the other hand, the considerations to which I have pointed attention create no difficulty if the obligation be regarded as one by which the society insure the debenture-holder against the event of his sustaining loss by reason of Sands, Wilson & Co. not performing their obligations. Take, for instance, obligation 2 (*b*) in the society's guarantee; it is an obligation in case the mortgaged properties do not upon realization answer the debt to protect the debenture-holder against loss in that event by paying him the balance of the debt. The case seems to me similar to but in some respects stronger than *Dane* v. *Mortgage Insurance Corporation* (1) as being an obligation of insurance and not of suretyship. I say that it is stronger because the obligation in *Dane* v. *Mortgage Insurance Corporation* (1) was to pay the principal sum if the debtors made default, whereas in this case the obligation is to pay the differential sum, being the balance unsatisfied after realization of the mortgaged properties. In *Dane* v. *Mortgage Insurance Corporation* (2) Lord Esher, speaking of the policy in that case, said: "The policy is not a guarantee that the bank will be able to pay: it is a positive direct contract that, if the bank does not pay a certain amount on a fixed day, the insurance company will pay that amount." That is true of the present case except that there is the stronger point that the society here is not bound to pay the sum which Sands, Wilson & Co. ought to pay, but only (except in the event of the debenture running to 1910) a different sum, namely, the unsatisfied balance after realization of the mortgaged property. The reasoning in *Dane* v. *Mortgage Insurance Corporation* (1)

(1) [1894] 1 Q. B. 54. (2) [1894] 1 Q. B. 61.

and in *Finlay* v. *Mexican Investment Corporation* (1) applies, I think, to the present case.

In arriving at the conclusion that this tripartite contract is one not of suretyship but of insurance, I have not founded myself at all upon any language in the documents. In fact the society became bound in return for the receipt of a certain premium as the price of its obligation. This, however, does not appear in the documents to which the debenture-holder was a party. The true effect of the contract is to be ascertained, I think, not upon a scrutiny of the terms used but upon an examination of its effect.

I will assume, then, for the moment that I am right in thinking that this tripartite contract is one of insurance. The next question is, what is the effect of the second contract? This was one between two parties only, namely, the society and the Liverpool Mortgage Insurance Company, whom I call the company. If the first contract was one of insurance, the society had an insurable interest. They were at risk, and the second contract is one by which the company guarantee the society to the extent of two-elevenths of the risk and the like proportion of all costs and expenses. This is a re-insurance. As between the society and the company, the former, having an insurable interest, are entitled to recover from the latter upon the re-insurance the proper proportion of the loss whether the society have paid the entirety of the loss or not. This was assumed in *In re Eddystone Marine Insurance Co.* (2) The question there was whether the relation was different when the words of the instrument were "to pay as may be paid thereon." The Court held that this did not make a difference, and that the re-insured was entitled to recover from the re-insuring office payment on the policy of re-insurance although it had not made payment upon the original policy of insurance. If this be the proper view of the effect of the two contracts, the appellants are right in their contention.

But, secondly, I will assume (contrary to the opinion which I have expressed) that the first—the tripartite contract—was not one of insurance but one of indemnity. The society are then entitled to be indemnified against two-elevenths of a debt

(1) [1897] 1 Q. B. 517. (2) [1892] 2 Ch. 423.

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of 4988*l.* 6*s.* 11*d.*, which, having regard to the liquidation of the society, can be enforced by the debenture-holder only to the extent of, say, 10*s.* in the pound on that sum. Is the liquidator entitled to recover from the company only that 10*s.* in the pound; can the company say that they have discharged themselves when they have paid the liquidator 10*s.* in the pound, being the amount which, under the circumstances, is the limit which the debenture-holder can enforce against the society?

The first question here is, I think, upon the language of the second contract. The company guaranteed the society against two-elevenths of the costs and expenses incurred by the society. They would have to pay these (to the indemnity of the society) to the persons to whom the costs were due, or would have to pay them to the society and thus put the society in funds to pay those persons, whether the society had already paid or was about to pay them or not. Their obligation to pay such sum as is payable in respect of the guarantee to the extent of 5000*l.*, being two-elevenths of the risk, is exactly the same. Each alike must be measured and satisfied either by a payment of 10*s.* in the pound or of 20*s.* in the pound. The question is, which of these two is it? The obligation as to the costs must, I think, be an obligation to pay 20*s.* in the pound as above stated. If so, the obligation as to the 5000*l.* must likewise be an obligation to pay 20*s.* in the pound. It is said that in *Carr* v. *Roberts* (1) the Court found an obligation not to indemnify only but to pay also, and that something turned upon that fact. I do not agree. In *Ashdown* v. *Ingamells* (2) Bramwell L.J. pointed out that the fact that the agreement is not merely to indemnify but also to pay is not material. The measure of damage, according to *Carr* v. *Roberts* (1), *Ashdown* v. *Ingamells* (2), and *In re Perkins* (3), is not the dividend which the estate of the principal debtor can pay, but the full amount for which the principal debtor is liable. Lord Lindley in his work on Partnership, 5th ed. p. 375, in a passage which is quoted by Wright J. in *Wolmershausen* v. *Gullick* (4), says: "Where one person has covenanted to indemnify another, an action for specific performance may be

(1) 5 B. & Ad. 78.
(2) 5 Ex. D. 280, 284.
(3) [1898] 2 Ch. 182.
(4) [1893] 2 Ch. 514, 527, 528.

sustained before the plaintiff has actually been damnified; and the limit of the defendant's liability to the plaintiff is the full amount for which he is liable; or if he is dead or insolvent the full amount provable against his estate, and not only the amount of dividend which such estate can pay." The latter part of this passage is to be found repeated in the 8th edition at p. 438. Effect was given to this obligation in *Cruse* v. *Paine* (1) and in *Lacey* v. *Hill*. (2) The equitable doctrine is that the party to be indemnified can call upon the party bound to indemnify him specifically to perform his obligation, and to pay him the full amount which the creditor is entitled to receive, and that whether having received it he applies it in payment of that creditor or not is a matter with which the party giving the indemnity is not concerned. In such a case the party indemnified is entitled to receive 20*s*. in the pound, and, having got it, to deal with it as he thinks proper. The case is otherwise where the party giving the indemnity is concerned with the application of the money which he pays. This was the case in *In re Richardson*. (3) The wife who was bound to indemnify was there concerned in seeing that the money which she paid went to the lessor so as to relieve the property of which she was beneficial owner from the consequences of non-payment of rent and damages for breach of covenant. In *Cruse* v. *Paine* (1) the stock jobbers were interested in seeing that the amount which they provided was applied in discharging the calls upon the shares. In *In re Perkins* (4) the executors of assignee No. 2 were interested in the application of that which they had to pay in discharging the obligations under the lease. But here the company are not interested in the question whether the amount which they pay does or does not go to the debenture-holders. The case is that which is put in *Carr* v. *Roberts* (5), where both Littledale J. and Patteson J. at the conclusion of their judgments point out that it is the duty of the defendant to pay the whole amount, and it makes no difference whether it is applied in discharge of the debt, or whether the plaintiff, having recovered it, does not make a

(1) L. R. 6 Eq. 641; 4 Ch. 441.
(2) L. R. 18 Eq. 182.
(3) [1911] 2 K. B. 705.
(4) [1898] 2 Ch. 182.
(5) 5 B. & Ad. 78.

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proper use of it. In the alternative, therefore, and if the contract is not one of insurance but of indemnity, I think it still results that the company are liable to the liquidator of the society for the full sum, and not 10*s.* in the pound in respect of the sum.

In the winding up of the society a scheme of arrangement has been carried which provides for a moratorium. The company have come in under article 23 of the scheme, and have thus assented to have their liability ascertained on the footing that the claim of the assured under the scheme shall be treated as the amount payable under the re-insurance. In the view which I have expressed of the nature of the contract by which the company is bound nothing arises upon the scheme which affects in any way the question to be decided. Except as effecting a moratorium, the scheme leaves the liability of the company unaffected.

I am anxious to point out some consequences which would ensue if the view I have expressed were not the right one. The contrary view is one which makes it to the interest of the company that the society should be insolvent. For to such extent as the society cannot pay in full the argument is that the company are not liable to make payment. It is obvious that such a consideration cannot have entered into the contemplation of the parties in fixing the premium. The company has received a certain premium upon the terms that in an event it shall pay a certain sum. If its liability is reduced to 10*s.* in the pound, it has received payment of premium as the price of an obligation to pay 20*s.*, but is, by reason of circumstances not material at all so far as the company is concerned, relieved of one half of the liability. If this were true a society whose credit was bad ought to pay a less premium than a society whose credit was good, because the obligation would in the former case result in a smaller liability. The fact is, I suppose, that as matter of business if the credit of the society were bad a larger, not a less, premium would be demanded as the price of the guarantee.

The argument of the respondents is best illustrated by an example. Assume that the liability to the debenture-holders is 11,000*l.* and that consequently the liability of the company is 2000*l.*, being two-elevenths of that sum. Assume that the other

debts of the society are 5000*l.* and 4000*l.* Exclude for the moment the 2000*l.*, there remain 9000*l.* + 5000*l.* + 4000*l.*, that is 18,000*l.* of debts. Suppose the assets to be 1800*l.*, this will give a dividend of 10 per cent. The company are liable, say the respondents, to pay 10 per cent. on the 2000*l.* The society then bears nothing as regards the 2000*l.* debt and has been indemnified, and the creditors will all alike get a dividend of 10 per cent. The fallacy, I think, lies in saying that this is indemnity, and that the right of the creditors is satisfied by such an adjustment. If the right of the society against the company is, as it certainly is, an asset of the society, it is one upon which the society is entitled to realize the full amount for which the company are liable. Until that has been got in, it is misleading to say that the society can only pay 10 per cent. It can pay such dividend as its assets will produce after the claims against the company and others in like case have been realized. The liability of the company is an element in determining the amount of the dividend. The respondents want to take the amount of the dividend as a fixed factor, and to determine the liability accordingly. In my opinion this is wrong. If the society had not gone into liquidation, it would have had a right of action against the company for 20*s.* in the pound on the company's liability, and none the less if its assets were so small that after recovering the amount the assets would be insufficient to pay the creditors, including the debenture-holders, 20*s.* in the pound. That right of action has vested in the liquidator. Why has he a less right because the estate in liquidation will not pay 20*s.* in the pound? How is the right affected by the fact that the right of action became exercisable for the first time after winding-up commenced? Whether the contract be one of insurance or one of indemnity, the appellants are, I think, entitled to succeed.

It seems to me that the order under appeal ought to be discharged and there should be substituted a declaration which, subject to any suggestion which the parties may make as to its form, should be a declaration that the company are liable to pay to the liquidator of the society two-elevenths of the deficiency remaining after applying the proceeds of the mortgaged

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properties towards payment of the debenture debt. In this concrete case that would mean, as I understand, that the company are liable to pay to the liquidator two-elevenths of 4988*l.* 6*s.* 11*d.*

KENNEDY L.J. read the following judgment:—The question to be decided in this case—and in my view it is by no means an easy one—does not, I think, depend at all upon a close examination of the language of the contract into which the Law Guarantee Trust and Accident Society, Limited (which I shall call the society), entered under the tripartite arrangement to which Sands, Wilson & Co., Limited, and their debenture-holders, were the other parties. Some time was expended at the hearing of the appeal in this Court in discussing the precise nature of the obligation undertaken by the society towards the debenture-holders. Is its proper category "guarantee" or "suretyship" or "indemnity" or "insurance"? In the document which constitutes the tripartite agreement the word describing the obligation of the society is "guarantee." In my view this matter is not important. The obligation of the society towards the debenture-holders, although not co-extensive or identical in all events with the obligation of Sands, Wilson & Co. to those parties, might, I think, without thereby affecting the issue which we have to decide, be treated as coming within any one of those categories; one might, in regard to suretyship and insurance, for example, apply to the description of this tripartite agreement the language of Kay L.J. in *Dane* v. *Mortgage Insurance Corporation* (1) and say that "It does not seem to me material to consider whether the contract sued upon is a contract of suretyship or a contract of insurance." The one matter which it is material to consider is the ultimate effect of the tripartite agreement, so far as it affects the responsibility of the society; and, in my opinion, whether the undertaking of the society ought to be classed as an insurance, an indemnity, a suretyship, or a guarantee, the effect of it was that under it the society became bound, in an event which has in fact occurred, to pay to the debenture-holders a large sum of money. Having this risk,

(1) [1894] 1 Q. B. 54, 62.

the society, in order to relieve itself of it in some part, entered into a contract with the Liverpool Mortgage Insurance Company (referred to hereafter as the company) which was indorsed on a form of debenture in the form of a memorandum dated March 23, 1904, and signed by the representatives of the two interested parties. That memorandum, so far as it is material, is in the following terms: It is headed "Premium 25*l.*" "The Liverpool Mortgage Insurance Company, Limited (hereinafter called 'the guarantors'), hereby guarantee the within named Law Guarantee and Trust Society, Limited (hereinafter called 'the society'), to the extent of 5000*l.*, being two-elevenths of the risk assured by, and subject to, the conditions of the within policy of debenture insurance, and also the like proportion of all costs and expenses incurred by the society with the consent of the guarantors in respect of any claim arising under the within policy or in relation to the enforcement with the like consent of the society's powers as transferees of the debentures so long as the annual premium of 25*l.* shall be paid on the 30th day of August in each year, or within thirty days hereafter." I may note in passing that the company, according to the actual words of this document, assent to the description of the nature of the society's liability under the tripartite agreement as the liability of insurers.

What is the legal effect of this memorandum? The society contends that it created a contract of re-insurance. Neville J. has held that it is more properly described as a contract of limited indemnity. (1)

In my opinion, if, as I think it is not incorrect to say, the obligation of the society under the tripartite agreement was a contract of insurance, this contract between the society and the company is a contract of re-insurance. But, whatever name be given to the obligation which the society undertook towards the debenture-holders under the tripartite agreement, I think that the company by this contract insured the society against the risk which that obligation involved to the extent of 5000*l.*, being two-elevenths of the sum which the society might in a certain event be called upon to pay in performance of that obligation,

(1) [1913] 2 Ch. 612.

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and also the like proportion of the costs and expenses incurred by the society, as mentioned in the memorandum. In other words, the company, in the event of the society becoming, as it has become, liable to pay the debenture-holders, became thereupon liable to pay the society two-elevenths of the amount, together with the like proportion of costs and expenses incurred by the society. I hold this to be a contract of insurance. I will add that I should not be prepared to hold that there would be a difference in the result in regard to the liability incurred by the company if it be treated as a contract of indemnity. There appears to me to be authority for holding that, in the view of a Court of Equity, to indemnify does not merely mean to reimburse in respect of moneys paid, but (in accordance with its derivation) to save from loss in respect of the liability against which the indemnity has been given. See Wright J. in *Wolmershausen* v. *Gullick* (1), citing Lord Lindley's work on Partnership, 5th ed. pp. 374, 375. As Neville J. points out in the course of his judgment in this case (2), if it be held that payment is a condition precedent to recovery, the contract may be of little value to the person to be indemnified, who may be unable to meet the claim in the first instance. If this is true in regard to a contract of indemnity in general, it is certainly true of contracts of insurance and re-insurance, which are essentially contracts of guarantee against loss by an event. See Brett L.J. in *Castellain* v. *Preston* (3) and Bowen L.J. in the same case. (4) In the case of a re-insurance policy the attempt was made in *In re Eddystone Marine Insurance Co.* (5) to argue that the re-insurer was not bound to pay the party who effected the re-insurance until he had paid the assured on the original policy, but Stirling J. (as he then was) held that payment on the original policy was not a condition precedent to the right to recover on the policy of re-insurance.

In my view, the society, upon the happening of the event which, under the terms of the tripartite agreement, involved it in the liability to make a payment to the debenture-holders,

(1) [1893] 2 Ch. 527, 528.
(2) [1913] 2 Ch. 612.
(3) 11 Q. B. D. 380, 387.
(4) Ibid. 403.
(5) [1892] 2 Ch. 423.

became entitled, under the contract which it had made with the company, to require the company to pay to the society two-elevenths of that amount, and the same proportion of the costs and expenses referred to in the memorandum, and the company had no right to say to the society "We will wait, before paying, to see how much you will pay in discharge of your liability to the debenture-holders."

This being that which may be called the normal position, is it altered by the fact of the insolvency and liquidation of the society? It is contended on behalf of the company that it is; that, inasmuch as the debenture-holders will not be able to enforce against the society payment in full of the amount due to them from the society, but only payment of a dividend upon their proof in the liquidation for that amount, the company, so far as the indebtedness to the debenture-holders as distinct from costs and expenses is concerned, will satisfy its contractual obligation to the society if it pays only the amount of that dividend. This question might have arisen on the facts stated in the report of that case in *In re Eddystone Marine Insurance Co.* (1), but it does not appear to have been argued by counsel or dealt with by the learned judge. I do not think that the contention of the respondents is sound. How the person who receives payment of a sum of money under a contract of insurance or re-insurance, or, I will add, of indemnity, deals with that sum is, in general and apart from special considerations, no concern of the party who, in fulfilment of his contract, has made the payment to him. Upon what grounds of equity or legal logic can it be argued that, because the law, on grounds of public policy, compels the creditor, the liability to whom is the event upon which the right of a bankrupt or of an insolvent company to payment of the sum covered by the contract arises, to be content with such share of the assets of the bankrupt or the company in liquidation as a pari passu distribution between creditors will give, those assets are not to include the payment due under the contract? If the discharge of the liability, against which the contract of insurance or re-insurance was the protection, is not (and I think that it is not) a condition

(1) [1892] 2 Ch. 423.

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precedent to the right to claim payment of the amount of the insurance or the re-insurance, upon what ground ought it to be held that, if the person entitled to that payment becomes bankrupt, or, if a company, goes into liquidation, the trustee of the bankrupt or the liquidator of the insolvent company does not have the right to the payment of that amount in full which the bankrupt before his bankruptcy or the company before its liquidation possessed because, when he has received the amount, the law intercepts the asset in his hands, and compels him to apply it in a particular way as part of the estate divisible amongst all the creditors? I confess myself unable to see any principle upon which such a contention can be supported; and, although there is not, so far as I know, any express decision upon the point, Mr. Younger was, I think, warranted in citing language in the judgments of Littledale J. and Patteson J. in *Carr* v. *Roberts* (1), and in referring to the grounds upon which *Dane* v. *Mortgage Insurance Corporation* (2), *Finlay* v. *Mexican Investment Corporation* (3), and *Ashdown* v. *Ingamells* (4) were decided, as tending to support his contention to the contrary. I do not think that it is true to say that in such a case as the present the party who is entitled makes a profit; he gets only the amount for the payment of which he bargained in the event which has occurred, and he has paid a premium based upon the risk, in such event, of that amount having to be paid. Buckley L.J. has dwelt in his judgment upon the strange consequences that, as pointed out by the appellants' counsel in their argument before us, would ensue if the argument put forward in the present case on behalf of the company were held to prevail. I agree with him in these criticisms.

I desire only, in conclusion, to refer to the case of *In re Richardson* (5), which my brother Neville seems to treat as an authority for the view which he has taken of the present case. It appears to me that we can decide the present question in favour of the society without differing from the decision of the

(1) 5 B. & Ad. 78.
(2) [1894] 1 Q. B. 54.
(3) [1897] 1 Q. B. 517.
(4) 5 Ex. D. 280.
(5) [1911] 2 K.B. 705, 711.

Court of Appeal in that case. The circumstances were peculiar. The husband's right of indemnity, upon which the wife was sued in an action in which the trustee in bankruptcy of her husband's estate and the husband's landlord were joint plaintiffs, was not a contractual right but an equitable obligation arising from the relation of cestui que trust and trustee which existed between wife and husband; and it was held by the Court of Appeal that the husband's trustee in bankruptcy could avail himself of the husband's right of indemnity only for the purpose of passing on the money, which his wife paid by way of compromise in the action, to the landlord, his co-plaintiff, who was the principal (or ultimate) creditor. To hold otherwise, said the Master of the Rolls, would be to allow a trustee to make a profit out of his position as trustee. In the present case the right to payment upon which the society is insisting depends upon an express contract, whether of insurance or re-insurance, for the payment in a certain event of a sum of money. The debenture-holders are not parties to these proceedings. There is no bond of connection between the company and the debenture-holders. The company has no sort of interest in seeing how the money due from the company to the society is applied by the society.

For the reasons which I have stated, I concur with the other members of this Court in holding that the appellant society is entitled to succeed; and I have only to add that I have not referred to the scheme of arrangement which has been adopted in the liquidation of the society, and into which the company has entered, because, if I understand rightly the nature of its provisions, they do not affect the decision of the particular point involved in the present appeal.

SCRUTTON J. read the following judgment:—This is an appeal by the liquidators of the Law Guarantee Trust and Accident Society, Limited, whom I will call the society, against orders of Neville J. (1), dated October 31, 1913, and Warrington J. (2), dated March 9, 1914. These orders purport to fix the amount and conditions of liability of the Liverpool Mortgage Insurance

(1) [1913] 2 Ch. 604. (2) [1914] W. N. 117.

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Company, Limited, whom I will call the insurance company, under their insurance or guarantee of the society. The liability of the society insured is under their guarantee, under conditions to be referred to, to the debenture-holders of Sands, Wilson & Co. (1900), Limited, of the principal and interest due to them from Sands, Wilson & Co. on their debentures.

The society as part of their business guaranteed to debenture-holders the payment of principal and interest by the company issuing the debentures. They usually did so as part of the arrangement under which that company offered debentures to the public, and had an arrangement with that company in the nature of a debenture trust deed; while their guarantee to the debenture-holder was annexed to each debenture issued. Accordingly each 100*l.* debenture issued on August 30, 1900, by Sands, Wilson & Co. contained a promise by Sands, Wilson & Co. to pay the principal sum of 100*l.* on August 30, 1910, or upon such earlier day as it might become payable in accordance with the conditions indorsed thereon (with a bonus of 5*l.* per debenture if Sands, Wilson & Co. repaid the debenture before the appointed day on six months' notice). It also contained a promise to pay interest at the rate of 4½ per cent. on February 28 and August 30 in each year. There was also annexed to the debenture a "guarantee" by the society to the registered holder of the debenture of the payment of the principal moneys and interest, but not bonus; (1.) as to interest, that if Sands, Wilson & Co. should make default for thirty days, the society would pay the amount on demand; (2.) as to principal, that if there were default in the payment of the principal moneys or any part thereof, the society would pay the amount thereof upon whichever of the days following should first happen, (*a*) August 30, 1910, (*b*) the day after the securities for the debenture-holders should have been enforced and completely realized and distributed. The society having taken this and numerous other similar liabilities desired to protect themselves by re-insurance; and by a policy indorsed on a specimen debenture and dated March 23, 1904, the insurance company "guarantee" the society "to the extent of 5000*l.*, being two-elevenths of the risk assured by, and subject to, the conditions of the within policy of debenture insurance" (i.e., the society's

guarantee indorsed on the debenture), "and also the like proportion of all costs and expenses incurred by the society with the consent of the guarantors in respect of any claim arising under the within policy . . . . so long as the annual premium of 25*l.* shall be paid on the 30th day of August in each year."

In September, 1909, Sands, Wilson & Co. being in difficulties, the society as trustees for the debenture-holders entered into possession. On December 14, 1909, an order for liquidation of the society's affairs under the supervision of the Court was made. In this liquidation a scheme of arrangement was sanctioned by the Court which provided for a moratorium of claims in the liquidation for principal moneys till December 31, 1918, the liquidators paying interest meanwhile at the rate of 3 per cent. The loss of principal of the debenture-holders of Sands, Wilson & Co., after realization of securities, was assessed at 4988*l.*, or 26*l.* 5*s.* 1*d.* per 100*l.* debenture, and a proof to that amount was admitted in the liquidation of the society. This loss was finally assessed after August 30, 1910, and therefore the society were under their guarantee liable in strictness to pay the full amount of the principal, getting the benefit of the securities when realized. The scheme of arrangement of the society offered re-insurers of risks guaranteed by the society two options, one of which was "to be bound by the scheme in all respects, and accordingly to have their liabilities in respect of re-assurances ascertained on the footing of the claims of the assured made and allowed under this scheme being treated as the amount payable under the policies re-insured." The insurance company accepted this latter option. Accordingly, as the claims of the debenture-holders of Sands, Wilson & Co. have been allowed at 4988*l.*, this amount will be payable on December 31, 1918, by the society, and the insurance company accept this as the amount payable by the society under their guarantee. The proof as pointed out might strictly have been based on the full amount of principal. It is highly probable, however, that the assets of the society will not be sufficient to pay the creditors in full, and the question then arises, which is the subject of this appeal, whether the insurance company are bound to pay the society two-elevenths of the amount of the admitted proof, or only two-

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elevenths of the amount of the dividend which the society pay on the proof.

The liquidators accordingly took out a summons before Neville J. asking for a declaration that payment in full by the society in respect of liabilities incurred on policies or guarantees was not a condition precedent to the liability of the insurance company on re-insurances by them of the same risks, and that such liability of the insurance company was not limited by, or proportional to, the amount of the dividend paid or to be paid by the society to the persons entitled to such policies or guarantees. On this summons Neville J. made an order declaring that payment by the society of liabilities incurred under policies or guarantees is not a condition precedent to the liability of the insurance company on re-insurances by the latter company of the same risks, but that the ultimate liability of the insurance company under such re-insurances is limited to the proportional amount of the dividend and other sums paid or to be paid by the society to the persons entitled to such policies or guarantees, and that any sum in excess of such proportional amount paid by the insurance company to the society in respect of such re-insurances will be held by the liquidators on behalf of the company. (1) This order, if I follow it, though Warrington J. has taken a contrary view of its effect, allows the liquidators of the society to recover the full amount of the admitted proof from the insurance company, with an obligation to repay so much of it as the liquidators do not pay in dividends to the debenture-holders of Sands, Wilson & Co. Neville J. in his judgment threw out the suggestion that the society might recover or be compelled to recover the whole amount for the benefit of the debenture-holders, but declined to decide it as the matter was not before him. A further summons was taken out on November 10, 1913, for a declaration that the insurance company might properly be required to pay direct to the debenture-holders the sum guaranteed; and this summons came on before Warrington J. on March 9, 1914. (2) That learned judge treated the decision of Neville J. as one "that the company might be called on to pay as soon as the liability has actually matured, that is to say,

(1) [1913] 2 Ch. 604. (2) [1914] W. N. 117.

as soon as it is ascertained that the assets of the society are liable to pay a dividend on £*x* to the debenture-holders in Sands, Wilson & Co. the company might be required to pay that £*x* to those debenture-holders." He treated the declaration he was asked to make as inconsistent with this interpretation of the judgment of Neville J. and refused it. Thereupon the liquidators appealed to the Court of Appeal, asking in substance for three alternative declarations: (1.) that payment in full by the society was not a condition precedent to the liability of the insurance company, who were not entitled to limit their liability to the amount of the dividend paid by the society; (2.) that to the extent to which the liquidators pay the debenture-holders' proofs they will be entitled to be repaid by the insurance company those amounts in full, but not exceeding two-elevenths of the sum guaranteed; or (3.) that the insurance company may be required to pay directly to the debenture-holders two-elevenths of their loss. The second alternative may be disposed of at once. It was apparently founded on a suggestion that the insurance company had really re-insured or guaranteed the first two-elevenths of the loss, and might therefore be required to pay two-elevenths of the admitted proof, although only a dividend was paid on the proof, so long as the total dividend paid was equal to or more than two-elevenths of the proof, and two-elevenths of the proof did not exceed 5000*l*. On this it is sufficient to say that a bargain might be made to re-insure the first two-elevenths of the loss, or the first 1000*l*., or the loss in excess of 1000*l*., or any other proportion or part of the loss, but that there is no trace of such a bargain in this case.

The questions before us really resolve themselves into this: Is a re-insurer or guarantor relieved pro tanto from liability to his assured or guaranteed by the fact that the latter is insolvent and so unable to pay more than a dividend on the liability re-insured, the liability of the re-insurer being thus reduced by the insolvency of the re-insured? And, if so, can the re-insurer or guarantor be compelled to pay direct to the original assured or principal creditor the sum for which the latter has an admitted claim on his assurer or guarantor, for which sum such assurer or guarantor would, if he paid, have an admitted claim on his re-insurer?

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It was obvious from the arguments before us that this was a matter of considerable difficulty. For the insurance company it was said that their contract, whatever it was called, was a contract of indemnity, and that they indemnified the society if they paid it what it had to pay: to pay it more would be to enable the society, or its general creditors, to make a profit. For the society it was said that the whole object of re-insurance might be to save oneself from bankruptcy in case of claim, but that the contention of the insurance company involved that a person with no assets other than full re-insurance against his insurance liabilities would yet be driven into bankruptcy, and only recover from his re-insurers the nominal dividend his general assets could pay. Premiums on such re-insurances would have to be regulated not only by the solvency of the original principal debtor, but also by the solvency of the person whose risk was re-insured; the more insolvent the latter was the less the re-insurer would have to pay. And, it was said, how is what the re-insurer is to pay, that is the dividend, to be ascertained until you know his contribution? His contribution when made will increase the general dividend, and this increase will again increase his contribution. To this it was answered that the rule would be: find what dividend the general assets apart from claims on re-insurers would pay the general creditors apart from those whose claims were re-insured; collect this dividend from such re-insurer. It is perhaps sufficient to say there is no trace of this complicated rule in the policy, and it would not apply to cases where there were no general creditors whose claims were not re-insured. For instance, for simplicity take a man who has only insured one risk of 1000*l.* and, having no assets, has re-insured his whole risk. He becomes insolvent, and a claim for a total loss accrues on his policy. Left to himself his dividend to his creditor will be nil, and on the argument of the insurance company the amount payable by his re-insurer will be nil. Yet in fact he should remain solvent, his re-insurer providing the funds to satisfy his only debt. The same result would follow if he had ten fully re-insured policies and ten losses. If it be said that the society's argument enables the general creditors to make a profit, the answer appears to be that it is not the society's argument,

but the operation of law which, though a creditor has a claim which the debtor has re-insured, takes the contribution of the re-insurer and divides it between the general body of creditors, because the creditor has no privity with the re-insurer, and no charge, lien, or equitable security, on his payment to the debtor.

Considerable discussion took place before us whether the obligation of the society to the debenture-holders was that of surety for the principal debtors, Sands, Wilson & Co., or insurers of the debenture-holders against the insolvency of Sands, Wilson & Co. In the view I take of the case it is immaterial to decide this point, or to discuss whether this document is nearer to that in *In re Denton's Estate* (1), which the Court of Appeal held to create the relation of principal and surety, or that in *Shaw* v. *Royce* (2), which Warrington J. held to be an insurance. I incline to the latter view. But it is clear that under the document, whatever it is, the society ran a risk of being called upon to pay if Sands, Wilson & Co. did not, or of incurring a loss if the realized securities did not cover the principal sum due under the debentures. This risk of having to pay, or risk of loss, was intended to be covered by the agreement entered into with the insurance company. And it seems to me clear that, on the principles laid down by the Court of Appeal in *Dane* v. *Mortgage Insurance Corporation* (3) and applied by Charles J. in *Finlay* v. *Mexican Investment Corporation* (4) and by Mathew J. in *Parr's Bank* v. *Albert Mines Syndicate* (5), this contract is a contract of insurance. Probably as an insurance against loss by a liability to pay money in certain events it may be correctly described as a contract of re-insurance. There is, however, no direct privity between the debenture-holder or principal debtor Sands, Wilson & Co. on the one hand and the insurance company on the other. The debenture-holder cannot sue the insurance company direct. If the insurance company can get at Sands, Wilson & Co. it will be by subrogation on payment of the society, and in the society's name. I am not aware of any way in which an original assured can get at a re-insurer; his rights

(1) [1904] 2 Ch. 178.
(2) [1911] 1 Ch. 138.
(3) [1894] 1 Q. B. 54.
(4) [1897] 1 Q. B. 517.
(5) (1900) 5 Com. Cas. 116.

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are only against the original insurer, the re-insured. If so, the insurance company have guaranteed two-elevenths of the risk assured by the society; the society have become liable to pay a sum of so many pounds, but have not the funds to pay it. Does this fact reduce the liability of the insurance company? Stated in this way the question seems to me to answer itself.

In marine insurance the question has been treated as comparatively settled. In England, in 1892, in the case of *In re Eddystone Marine Insurance Co.* (1), the Western Insurance Company re-insured certain of their liabilities on marine insurance policies on ships with the Eddystone Company by policies containing the clause "to pay as may be paid thereon." Losses occurred for which the Western Company were liable on their policies, and the Eddystone Company to the Western Company on their policies. But both companies were in liquidation, and the Western Company had not paid their assured anything, even a dividend. Before Stirling J. the Eddystone Company contended that they were liable to pay to the Western Company the proper rateable proportion of any dividend which might be paid to the original assured only when, and not until, such dividend had been actually declared and paid. Their counsel argued: "We cannot under this clause be compelled to indemnify the Western Company except in respect of what they may actually pay, and not until they have paid." The Western Company contended that, as they became liable to pay the sum assured by their policy on the occurrence of the loss, the Eddystone Company became liable to pay their proportion of such sum irrespective of any question whether the Western Company had paid wholly or in part the claim under their policy. Their counsel argued: "The Eddystone Company are bound to indemnify the Western against all claims up to the full amount of the re-insurance, whether the Western have paid anything or not"; and: "It cannot be contended that, if the insurer is insolvent and can pay nothing, the re-insurer is to keep his premium and escape all liability." Stirling J. said: "Now a main object of re-insurance is to relieve the re-insured from a portion of the risk previously undertaken by him; and the result of giving effect to the

(1) [1892] 2 Ch. 423, 426, 427.

liquidator's contention would be that, before the re-insured obtains the benefit of his re-insurance, he must himself have paid on the original insurance, even though bankruptcy might be the result. I think that this could not be intended, and that such a construction ought not to be put on the language of the policy unless it is clearly called for. In my opinion the words do not clearly require to be so construed. They would be satisfied if they were held to amount simply to this—that the payment to be made on the re-insurance policy is to be regulated by that to be made on the original policy of insurance. I am fortified in this view by the observations of Mr. Justice Mathew in the unreported case of *Martin* v. *Munich Assurance Company* (1), with the shorthand notes of which I have been furnished. The contention of the liquidator of the Western Company must accordingly prevail; and I hold that payment by his company is not to be taken to be a condition precedent to his recovering against the Eddystone Company." The judgment may appear to be ambiguous, for the phrase "the payment to be made" might mean liability or might mean actual payment. It has, however, been held that actual payment without legal liability will not do: *Chippendale* v. *Holt* (2); and Stirling J. says that the contention of the Western Company must prevail. The amount paid before the original insurer has paid can only be the whole liability, and the case is treated by the editors of Arnould on Marine Insurance, 8th ed., p. 422, par. 324, as deciding that the whole amount of liability and not the dividend only is payable. This view of the case has to my knowledge been taken in practice and business. The law in the United States seems to be the same. In *Herckenrath* v. *American Mutual Insurance Co.* (3), in 1848, the Chancellor held that the original assured had no claim for the whole sum received by his insurer from a re-insurer, but only to a dividend. The argument deals with the suggestion that the insurer makes a profit, pointing out that he makes no profit, but the State requires his assets to be distributed in a particular way; he parts with them all. "It is none the less a loss because they are unable to pay it in full." The

(1) June 1, 1891. (2) (1895) 1 Com. Cas. 197.
(3) 3 Barb. Ch. N. Y. 63.

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Chancellor cited and apparently approved a decision of the Commercial Court of Marseilles in 1748, cited by Émérigon (1), where the insolvent insurer paid 60 per cent. of the loss, but recovered 100 per cent. of the loss from his re-insurer, the Court holding that the re-insurer was bound to pay what the original assurer became liable to pay, not what he had actually paid. American text-writers take the same view. Parsons in his work on Marine Insurance, vol. i., p. 300, says: "The re-insured is not bound to pay his insured, and found his claim on this actual payment before he can call upon the re-insurer. For if the re-insured be insolvent, and pay but a small dividend on their policy, they have still a claim on the re-insurers for the whole amount for which they are re-insured,—this amount being measured by the risks which the re-insurers assume for the premium paid them." Phillips (Phillips on Insurance, 5th ed., pars. 1751, 1752) states the law: "A re-insurer is not liable for over the amount for which the insurer is legally liable. The amount of a total loss in a policy of re-insurance is not subject to be reduced below the value at which it is stipulated to estimate the property in the policy of re-insurance, on the ground of the insolvency of the re-assured, and of his failure to pay the full amount insured by the original policy." This may only deal with valued policies, but the principles do not seem to differ. It was suggested in argument that marine policies stood in a peculiar position. Having some acquaintance with them, I do not see why. The insurer re-insures a subject-matter, the ship, in which he has an insurable interest, in that if she is lost he will have to pay under his policy. The measure of his loss is not what he pays but what he is liable to pay: *Chippendale* v. *Holt*. (2) The original assured cannot sue the re-insurer, or claim that the money the latter pays is charged or secured to him. If the original assured has no privity with the re-insurer, why can the latter avail himself of the transactions of the assured?

Neville J. (3) thought himself bound by the decision in *In re Richardson* (4) to hold that the society could not recover from the insurance company more than they had actually paid, but could

(1) Traité des Assurances, vol. i., cap. 8, s. 14, p. 253; Translation by Meredith, 1850, p. 202.

(2) 1 Com. Cas. 197.

(3) [1913] 2 Ch. 612.

(4) [1911] 2 K. B. 705.

call upon the insurance company to pay off the debenture-holders. The latter point, however, he said was not before him; and it was not in the original summons. The facts in *In re Richardson* (1) were remarkable and peculiar. Richardson, the husband, was twice bankrupt. He was also lessee of some properties from St. Thomas's Hospital, and held them as trustee for his wife under circumstances explained in *Governors of St. Thomas's Hospital* v. *Richardson*. (2) Between his first and second bankruptcy the landlords got judgment against him for arrears of rent, damages for non-repair, and costs, and he then went into bankruptcy. The Court of Bankruptcy gave leave to the landlords to join with the trustee in an action against the wife as cestui que trust. I understand how the husband and his trustee could ask to be indemnified by the wife. I do not understand how the landlords had any direct claim against the wife to the sum claimed. However, the action never came to trial, for the wife paid 520*l.* to the two plaintiffs in compromise of a claim for 711*l.* Then the question arose who was to have the 520*l.*, the trustee for the general body of creditors, or the landlords, against whose claim the husband was to be indemnified, and the Court of Appeal gave the money to the landlords. But the Master of the Rolls stated that it was "not the case of a contractual right of indemnity," but of the "equitable right which every trustee has to be indemnified by his cestui que trust." The case did not decide that the trustee could not recover till he paid, and only what he paid. He had in fact paid nothing and got 520*l.* by consent. The authorities on insurance were not cited to the Court, which was not dealing with any questions of re-insurance, and while Fletcher Moulton L.J. made some very general statements as to the common law right of indemnity, they were not, as I read the decision, necessary for it, and if I understand the decision of the Court of Appeal in *Ashdown* v. *Ingamells* (3) were contrary to the common law rules therein laid down. In *Ashdown* v. *Ingamells* (3) A. agreed for valuable consideration to pay the trade debts of B.; he did not do so, and B. was forced into liquidation by his trade creditors, whose proof for 1750*l.*

(1) [1911] 2 K. B. 705, 709. (2) [1910] 1 K. B. 271.
(3) 5 Ex. D. 280.

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was admitted. The trustee of B. sued A. for damages, and it was replied that as B.'s estate would only have to pay a nominal dividend there were no damages. Huddleston B. agreed with this contention, but the Court of Appeal reversed him. They held that the insolvent, if solvent, would have recovered the full amount, whether it was a contract to indemnify or pay was immaterial, and that the trustee could recover what the bankrupt could, if solvent, have recovered, without regard to whether the estate had paid or not. I do not understand how this supports the view of Neville J., or justifies the general observations of Fletcher Moulton L.J. *Carr* v. *Roberts* (1) is to the same effect.

In the result I am of opinion that, as the society have admittedly incurred liability to the debenture-holders to the amount of 4988*l.*, the insurance company, who have guaranteed two-elevenths of that risk or insured them against two-elevenths of that risk, must pay them the amount of their liability. This would be even more strikingly true of the liability to pay expenses incurred imposed by the second part of the policy. If the society are liable to pay these expenses but insolvent, will the insurance company only be liable to pay a dividend on them? That, after they have paid, the law takes that sum they pay and divides it among general creditors so that the legal claim of the debenture-holders is not satisfied in full does not seem to me to afford any defence to the insurance company, who have no privity with the debenture-holders, but only when they have paid in full a right of subrogation to the rights of the society. I think the society are entitled to the first and second declarations asked for in their notice of appeal. The third declaration cannot be supported from any point of view. It is unnecessary to decide whether the society are entitled to the fourth declaration, but I incline to the view that under the decisions in *Lacey* v. *Hill* (2) and *Cruse* v. *Paine* (3) they would be if they were not entitled to the first and the second declarations.

Appeal allowed.

The order as drawn up was (omitting formal parts) as follows: "This

(1) 5 B. & Ad. 78. (2) L. R. 18 Eq. 182.
(3) L. R. 6 Eq. 641; 4 Ch. 441.

Court doth discharge the said orders "—of Neville J. and Warrington J.— "except so far as the same relate to costs. (1) And this Court doth declare that subject to the moratorium and in addition to the payments of interim interest enjoyed and imposed by the scheme of arrangement of the above-mentioned society the respondents, the Liverpool Mortgage Insurance Company, Limited, are liable to pay to the appellants as such liquidators "—of the society—"two-elevenths of the deficiency remaining after applying the proceeds of the sale of the mortgaged property towards payment of the debenture debt. And it is ordered that it be referred to the taxing Master to tax the costs occasioned by the said appeal, and that the said costs when taxed be paid out of the assets of the said society."

Solicitors: *Frere, Cholmeley & Co.; Sharpe, Pritchard & Co., for Alsop, Stevens, Crooks & Co., Liverpool.*

W. F. B.

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[1913 P. 105.]

Easement — Right of Way — Private Road — Right of Access of Owner of Dominant Tenement—Obstruction by Gates—Construction of Grant.

Where a right of way over land laid out as a roadway is granted or reserved to the owner of adjoining land as appurtenant thereto and to every part thereof, he is not entitled to have the roadway left unfenced for ever, but to reasonable access to the roadway.

In the case of a public highway any appreciable obstruction is actionable; but to enable the grantee of a private right of way to prevent the erection of a gate across the way he must shew that it will be a substantial obstruction to his easement.

The defendant granted to the plaintiff a piece of land to the extreme south of the bulk of his own land, and an adjoining piece of land (coloured blue on a plan) to the north of the land so granted, reserving to himself, his heirs and assigns, owner or owners of a messuage and land adjoining the blue land on the north, and his and their tenants and servants, and all other persons authorized in that behalf by him and them, from time to time and at all times and for all purposes, to pass and repass, with or without animals, carts, and carriages, over and along a road ten feet wide covenanted to be made by the plaintiff on the blue land; and the plaintiff by the same deed, as beneficial owner, granted to the defendant in fee simple the same right of way "as appurtenant to the same land and every part thereof."

The plaintiff made the ten-foot road on the blue land, the defendant's

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(1) This being a test case there was an arrangement that the costs, including the costs of the hearing in the Court of Appeal, should be paid out of the assets of the society.

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fence along the middle of it being moved back to the boundary of his own land on the north. The defendant built shops on his land and at the south-east corner thereof removed his fence for some sixteen feet along the roadway, so placing his shop frontage at this point that he left a triangular piece of his own land vacant, and bounded on one side by the frontage, on another by a public highway, and on the third side by the sixteen feet of blue road. The plaintiff then put a railing along this sixteen feet and erected a gate across the eastern entrance from the highway to the blue road. The defendant promptly removed both railing and gate :—

Held, on the construction of the grant, that this was a private right of way, that it had not been substantially interfered with, and the plaintiff was entitled to erect a gate, which, however, must be kept open during business hours and must never be locked.

Held, further, that the defendant was entitled only to reasonable access to the blue road, and that the plaintiff was entitled to erect a fence with a gate in it along the sixteen feet.

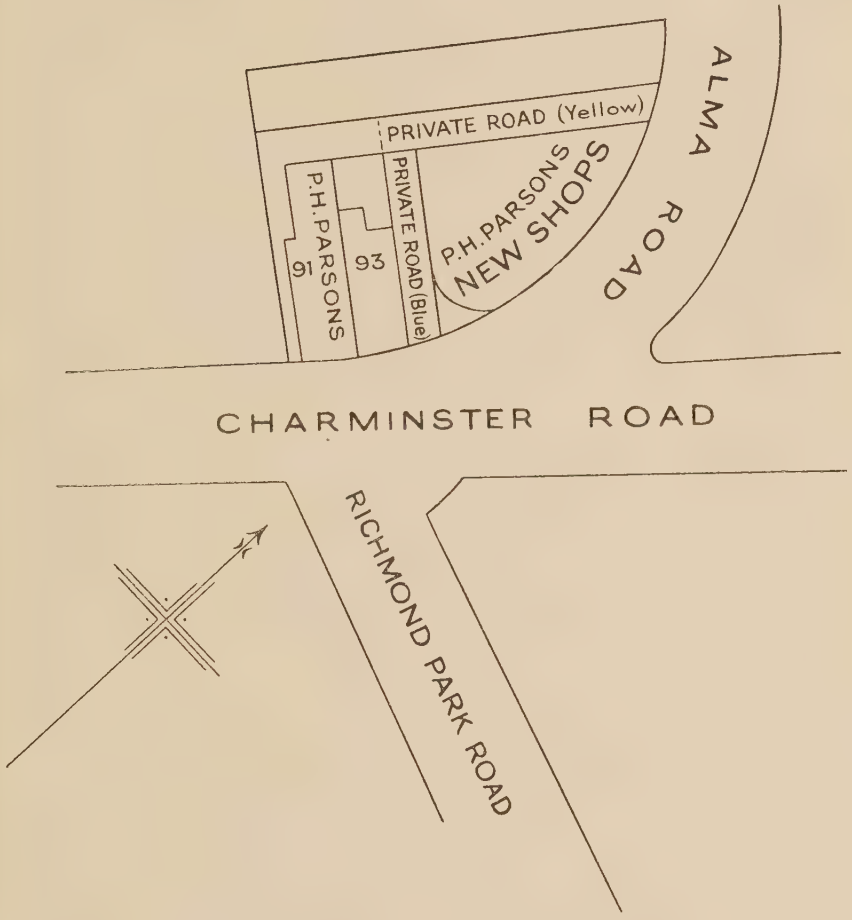
Decision of Sargant J. [1914] 1 Ch. 704 reversed.

APPEAL from a decision of Sargant J. (1)

In the year 1909 the defendant, Percy Herbert Parsons, contracted to buy certain lands and buildings which formed together practically a quarter of an ellipse. The curve of the ellipse was on the north-east of the property and formed the frontage to the junction of the Charminster Road, Bournemouth, with the Alma Road. The southern boundary of the land was a straight line, and the piece of land next and to the north of that line was occupied by a house, No. 91, Charminster Road. The western boundary of the whole of the land purchased was also a straight line, and was formed by a private road (coloured yellow on the plan on the conveyance below mentioned), which gave access to the back of Nos. 91 and 93, Charminster Road, those two houses having a frontage of about twenty feet each to the Charminster Road on the east, and running back to what was something like sixty-five to seventy feet. Immediately to the north of No. 91, Charminster Road was No. 93, Charminster Road, and along the northern boundary of the latter there was, at the date of the purchase by the defendant, a footpath some four or five feet wide. That footpath led from the Charminster Road on the east to the private road coloured yellow on the west, and Sargant J. drew the inference in favour of the defendant so far as it went

(1) [1914] 1 Ch. 704.

that normally each end of the footpath was protected by a gate, and that these gates had been from time to time knocked down and replaced. People could go along the footpath from east to west, get into the private road coloured yellow, and go out north along the yellow road into the Alma Road. The yellow road was



sufficiently wide to be used by vehicles, and was protected at its northern extremity by gates.

When the negotiations for the purchase by the defendant were taking place, some time in the summer of 1909, he entered into a corresponding negotiation with the plaintiff, Mrs. Peninnah Pettey, for the sale to her of No. 93, Charminster Road, which

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when it became her property would be bounded on the south by the defendant's shop, No. 91, Charminster Road, and on the north by the defendant's other property lying to the north of the footpath, which lastly mentioned land was then used as market gardens.

It was arranged between the plaintiff and the defendant that the footpath should be widened to ten feet and that for that purpose the fence on the north side of the footpath should be set back some six feet.

This was carried out by a conveyance, dated October 20, 1909 (a day after the conveyance to the defendant had been made), from the defendant to the plaintiff, and the rights of the parties depended on this conveyance. After recitals as to title and a recital that the vendor had agreed with the purchaser for the sale to her of the hereditaments and premises thereinafter contained, "with such right of way over the private roadway shown on the plan drawn on these presents as is secondly hereinafter described," it was witnessed that the vendor as beneficial owner conveyed to the purchaser first the pieces of land at the corner of the Charminster and Alma Roads, together with the messuage known as No. 93, Charminster Road, and coloured pink and blue on the plan (the site of the intended ten-foot road being coloured blue), "excepting and reserving full right and liberty for the vendor, his heirs and assigns, owner or owners for the time being of the messuage and premises now known as No. 91 Charminster Road and of the land lying to the north of the land coloured blue on the said plan, and his and their tenants and servants, and all other persons authorised in that behalf by him or them, from time to time and at all times hereafter, at his and their will and pleasure and for all purposes, to pass and repass, with or without horses, cattle, and other animals, carts, and carriages, over and along the road ten feet wide to be made by the purchaser over the land coloured blue in the plan drawn hereon in accordance with the covenant hereinafter contained, but no vehicle of any description shall be allowed to be stationary on the said road," and also excepting and reserving to the vendor, his heirs and assigns, owners for the time being of the vacant land to the north of the blue land,

power to build upon that vacant land, "and also excepting and reserving for the vendor, his heirs and assigns, owners of the said land now vacant, the right of eaves of any building to be erected by him or them to overhang the said land coloured blue on the said plan to a width not exceeding two feet. And secondly full right and liberty for the purchaser, her heirs and assigns, and her and their tenants and all other persons authorised by her or them in that behalf" to use the yellow private way up to and so far as the back gate of No. 93, Charminster Road, being the dotted line shewn on the plan, to hold the premises first and secondly described, except and reserved as aforesaid, unto and to the use of the purchaser, her heirs and assigns, in fee simple. In a later part of the deed the purchaser covenanted that she, her heirs and assigns, would within twelve calendar months make into and for ever after maintain as a road the land coloured blue, and would pave the same with blue bricks, and that she, her heirs and assigns, would pay to the vendor, his heirs and assigns, one moiety of the costs of maintaining and keeping in good repair and condition the yellow road and the gates leading therefrom into Alma Road. The deed concluded by witnessing that the purchaser, as beneficial owner, granted to the vendor "the right of way and easement of eaves described in the parcels first hereinbefore conveyed, To hold the same unto and to the use of the vendor in fee simple as appurtenant to the vendor's land and every part thereof."

Sargant J. found as a fact that the defendant never promised the plaintiff, as she alleged, that she should have a right of putting up a gate at the east end of the blue road, and of putting something on it to indicate the business of a dairy which she was going to carry on.

In November, 1910, the defendant began to prepare plans for new shops which he was desirous of erecting on his land to the north of the blue road, along the Alma Road frontage. In March, 1911, the plans were approved by the corporation, and in May, 1911, the erection of the shops was begun. About the end of November, 1911, the shops on the defendant's land were finished except that the fronts were not put in, so that they

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might be made in accordance with the desires and conveniences of tenants.

The new shops, where they fronted the blue road at its north-east corner, were not brought close up to the blue road, but were carried back in a curve, as shewn by the line on the plan annexed to this report, leaving open a nearly triangular piece of the defendant's adjoining land lying to the north of the blue road at the east end thereof, and 16 feet 2 inches in length from the pavement of the Charminster Road. The plaintiff erected a fence along this 16 feet 2 inches on the blue road, and between it and the defendant's land, but it was pulled down by the defendant.

About May 8, 1913, the plaintiff required this fence to be restored so as to keep the road private, and, after some discussion, she on May 23 erected, along the 16 feet 2 inches of frontage between the blue road and the defendant's land, a narrow iron railing, and she also erected across the east end of the blue road, fronting on Charminster Road, an ornamental iron gate containing her name. The same evening the defendant caused the railing to be removed, and either on that or the next day he, by inadvertence, charged up to the gate in his motor car and knocked the gate down.

The plaintiff shortly afterwards commenced the present action, claiming (1.) a declaration that she was entitled to erect and maintain a gate at the east end of the blue road; (2.) a declaration that she was entitled to erect and maintain a fence along the north side of the blue road from the east end thereof to the corner of the defendant's shops, or, in the alternative, to erect and maintain a fence in the position aforesaid with a gate therein sufficient to give the defendant reasonable access to the blue road from his land on the north side thereof; (3.) an injunction to restrain the defendant from pulling down or otherwise interfering with any gate or fence which the plaintiff might erect in the positions aforesaid in accordance with her rights as declared by the Court; (4.) an injunction to restrain the defendant from permitting any part of his buildings, other than eaves, to encroach on or overhang any part of the soil of the blue road.

The defendant, in his defence, said that after the execution of

the conveyance to the plaintiff the wooden fence north of the old footpath was removed by him and temporarily re-erected to the north of but immediately adjoining the northern boundary of the blue road, and that it was removed when he began to build, and that the erection of any gate at the east end of the blue road would be a breach of the plaintiff's implied covenant for quiet enjoyment; and he denied that the plaintiff was entitled to erect any fence, or wall, or gate on the blue road, or in that or any other way to obstruct the defendant's right of passage over the whole of the blue road or his right of entering the same from each and every part of his land on the north side thereof.

Sargant J. held (1) that the defendant was justified by the terms of the grant of his right of way in removing the rail and gate.

The plaintiff appealed.

Martelli, K.C., and *H. B. Bompas*, for the appellant. Sargant J. has held that under no circumstances is the owner of land over which there is a private right of way entitled to put a gate so as to obstruct the way. It is submitted that that goes too far. The plaintiff is entitled to put a gate at the end of this road so long as she does not deprive the defendant of the reasonable user of his right of way. In the case of a private right of way the owner of the right is only entitled to reasonable access. In the Court below *Andrews* v. *Paradise* (2) was relied upon as shewing that, where there is a private right of way to a man's land, putting up a gate across it is a breach of a covenant for quiet enjoyment; but there is nothing in that case to shew that a gate is in itself an obstruction. That case was argued on an admission that the gate there was an obstruction. It does not follow, as Sargant J. has held, that every gate is an obstruction.

James v. *Hayward* (3) is no authority for the proposition that the owner of the soil of a road over which there is a private right of way is not entitled to put a gate across it. What was said in that case was mere dictum and as a general statement of the law it cannot be right: Gale on Easements, 8th ed. pp. 507, 570;

(1) [1914] 1 Ch. 704. (2) (1725) 8 Mod. 318.
(3) (1630) W. Jo. 221.

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2 Rolle's Abr., p. 137, Nusans (C), (G). No doubt a gate is a nuisance, and therefore an obstruction, to a highway, but in order to create an obstruction of a private right of way there must be something which substantially interferes with the enjoyment of that right: *Thorpe* v. *Brumfitt* (1); *Sketchley* v. *Berger*. (2) In *Deacon* v. *South Eastern Ry. Co.* (3) there is a dictum of North J. to the contrary effect of that by Sir W. Jones in *James* v. *Hayward*. (4) Again, the grant of a private right of way does not, as in the case of a public way, give a right of access to every part of the road: *Clifford* v. *Hoare* (5); *Flynn* v. *Harte* (6); *Woodyer* v. *Hadden* (7); *Henning* v. *Burnet* (8); *Hutton* v. *Hamboro*. (9)

The right of access to a private way is at the accustomed points only. The defendant is only entitled to reasonable user of the right of way: *F. C. Strick & Co.* v. *City Offices Co.* (10); *Colls* v. *Home and Colonial Stores*. (11) He had no right to remove the alleged obstruction by force: *Lane* v. *Capsey*. (12) There was no substantial interference with his rights. Mere inconvenience is not sufficient to justify him in acting as he did.

Romer, K.C., and *Herbert S. Preston*, for the defendant. The gate was clearly an obstruction and we acted reasonably in removing it. Many rights of way have been created subject to gates and rights of ploughing and so forth, but this was not subject to anything of that kind, and the gate was an obstruction as Sargant J. has held. We should not object so much to a gate which was kept open during business hours. There is no difference for this purpose between public and private rights of way. Any sort of obstruction may be removed: *James* v. *Hayward* (4); *Pullin* v. *Deffel*. (13) It is true that in particular circumstances a gate has been held not to be an obstruction: *Flynn* v. *Harte* (6); but the judge's attention was not called to this point. The grantee of a right of way is entitled to go on to it at any point at

(1) (1873) L. R. 8 Ch. 650.
(2) (1893) 69 L. T. 754.
(3) (1889) 61 L. T. 377.
(4) W. Jo. 221.
(5) (1874) L. R. 9 C. P. 362.
(6) [1913] 2 I. R. 322.
(7) (1813) 5 Taunt. 125.
(8) (1852) 8 Ex. 187.
(9) (1860) 2 F. & F. 218.
(10) (1906) 22 Times L. R. 667.
(11) [1904] A. C. 179.
(12) [1891] 3 Ch. 411.
(13) (1891) 64 L. T. 134.

which he can get access to it: *Cooke* v. *Ingram* (1); *Henning* v. *Burnet*. (2) Therefore we object to the fence which prevents us from getting from our triangular piece of land in front of our shop on to the blue road. The defendant would have been entitled to build on his own land a row of buildings all opening into the blue road and entitled to use it. The fact that he has not done so ought not to prejudice him. Nobody has a right to put up a fence between the blue road and the defendant's land.

In the case of a private way the ownership and occupation of the surface remain in the owner of the soil. That confers no right on him to obstruct the way, substantially, or at all. In the case of a public way the way must not be obstructed at all. Any appreciable obstruction is forbidden, and the same rule applies to private ways.

Martelli, K.C., in reply.

Lord Cozens-Hardy M.R. This appeal has been very ably and strenuously argued in this Court, as it was in the Court below, and it raises two points which the parties consider to be of great importance.

The rights between the parties depend upon the terms of a conveyance dated October 20, 1909, between the defendant of the first part and the plaintiff of the other part. I must read a considerable portion of this deed, which has the merit of not being lengthy. [His Lordship read it and stated the facts.]

The great fight which has been raging between the parties is this: Is Mrs. Pettey entitled to put a gate at the Charminster Road end of the road coloured blue, fastened back, or capable of being fastened back, to her own wall, a ten-foot gate which will when shut be fixed to a post and attached in the usual way on the boundary of the blue land? The other great fight is as to the right of the defendant, Mr. Parsons, to say there shall be no fence erected by Mrs. Pettey admittedly on her own land for a space of 16 feet 2 inches. The defendant says the only reason why he wants to have the gate open is that his customers or people desirous to see what admirable goods he shews in his shop

(1) (1893) 68 L. T. 671. (2) 8 Ex. 187.

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windows may have a better chance of viewing them, whereas if a fence is put there they will not get the same view.

The two points are quite distinct. It must not be forgotten that this is not a highway; it is a private road. It must not be forgotten that the rights of interference with a right of way are by no means the same in the case of a public highway as in the case of a private road. In a public highway any obstruction is a wrong if it is appreciable. That I think is the recognized distinction. Any appreciable obstruction in a highway can be prevented by indictment or otherwise, but in the case of a private right of way the obstruction is not actionable unless it is substantial. There must be a real substantial interference with the enjoyment of the right of way. It is contended by the defendant that any gate which interferes with the full and absolute enjoyment of any and every inch of way is per se and necessarily an obstruction in respect of which he was justified in pulling down, as he did, this gate. On the other hand the plaintiff alleges that she is absolutely entitled to put up and maintain a gate at the east end of the blue road. As I read the pleadings it seems to me that it was not a claim to put up a gate which would be open during all business hours, but closed subsequently during the night. It is quite true there has been an expression of willingness in the course of the trial to limit the use of the gate in that sense, but the right originally claimed was unqualified. It seems to me that this is a case in which the defendant was absolutely wrong in saying that no gate could be erected there which would involve a post on his side of the blue land, even though it be kept open during all working hours and only shut during non-working hours when nobody can be inconvenienced by it. I think therefore upon that point the plaintiff is not entirely right in her whole case by any means, but is right to the limited extent which I will state in a few minutes.

With reference to the 16 feet 2 inch fence I have some difficulty in dealing with that, but I will endeavour to do so as far as I can. The defendant says, on the terms of the deed, which I have read, "I have not merely a right to pass in at one end of the blue road and out at the other, but I have a right to go to all or any part of my reserved land, and I have a right to go upon the blue

land wherever I like, and therefore I have a right to prevent the plaintiff from putting upon her own land any fence or division to rail it off." Whether in the case of a private right of way like this there is or is not the right to enter upon the private road merely by defined gates or passages, or a right to enter at any other place where it is desired, seems to me to depend upon the construction of the deed itself. I will assume in favour of the defendant, without expressly deciding it, that before any building was erected on this property he might have made an access into the blue land where he liked ; but to say that right entitled him as against the plaintiff to say, "The whole of this blue road which is next to me must be kept unfenced and open, so that at all times I may be at liberty from any point upon my land to get into this road," seems to me to be a wholly untenable proposition. I do not think I can do better on this point than refer to what was said in *Cooke* v. *Ingram* (1) by Wright J., where he says: "There is nothing in the original grant of the way which expressly limits the grantee to one line of access, or to access only at the points, if any, where his land actually adjoined the new way. And the parties certainly acted from the first upon the construction that the grantee was not limited to the shorter line of access, for the track always in fact used was not the shortest. In the absence of any such express limitation, and of anything to shew that the right as claimed is unreasonable or destructive of the object of the grant, I am unable to see any ground on which any obligation to elect one particular line of access can be implied." Here in my view the contention of the defendant is wholly and absolutely unreasonable. He has built his own shop right up to the blue. There is no door or gate or any opening into the blue. There is a blank space unfenced at the western end near the yellow private road, and there is this little triangular piece facing Charminster and Alma Roads, 17 feet 3 inches towards the road, and 16 feet 2 inches back to the gate ; and the defendant says it is reasonable in those circumstances that he should say to the plaintiff, "You shall not put any fence or wall on your own land, because I want the people to admire my goods by coming over the blue land into the triangular piece so that

(1) 68 L. T. 671, 674.

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they will get a better view than they can from the street." In my opinion an assertion like that is wholly unreasonable and ought not to be sanctioned.

The plaintiff has in terms offered to put a small gate in the 16 feet 2 inch fence which she proposes to put up. That seems to me to be giving the defendant on this part of the case all, I am not sure that it is not more than, the defendant is entitled to. That is an undertaking which was given during the hearing of this appeal.

The learned judge in the Court below, it is quite clear, treated the case before him as one in which there was an assertion of a right by the plaintiff to put up a fence which would or might obstruct the carts and carriages of the defendant going up or down the lane. That is the claim which, as a matter of construction, I hold is made in the statement of claim, and that is a claim which I think cannot be established. In my opinion what we ought to do is to discharge the judgment in the Court below, declare that the plaintiff is entitled to erect a ten-foot gate which will be kept open during business hours, an unlocked gate, so that after business hours it can be opened in case of need; but to limit her right in that way. I think we should also declare that the plaintiff is entitled to put up a fence on the 16 feet 2 inches in the terms of her undertaking to put a small gate there for the use of the defendant. That being so, the only question is what should be done with the costs. In my opinion, in the Court below both parties took an unreasonable view, and I think there should be no order as to the costs below, but the appellant should have the costs of the appeal.

SWINFEN EADY L.J. Two questions were raised by this appeal. The learned judge took the view that so far as the plaintiff was concerned it seemed to be a trumpery, trivial, and, perhaps he might say, a petty action. I cannot take that view. The parties here are in dispute as to their legal rights. One side takes one view, and the other side takes the other view, of what their legal rights are, and they come to the Court to have those rights determined.

The first question is as to the gate. [His Lordship stated the

effect of the conveyance.] What is reserved to the defendant and granted by the plaintiff is a right of way over and along a private way ten feet wide. The defendant is granted an easement of way in common with all other persons entitled to use the way. It is not an exclusive right of way. The view which Sargant J. took of the effect of such a grant was that it absolutely prevented the freeholder from placing a gate across the road. He said that would be an interference with the easement. The question whether it is an interference with the easement is a question of fact. The law is that when an easement has been granted the grantor cannot derogate from his grant, that is to say he cannot substantially interfere with the easement as granted.

The question we have to consider is whether the erection of the gate will be a substantial interference with the easement as granted. In *Clifford* v. *Hoare* (1) that was the way in which the law was put by Lord Coleridge C.J. In that case there was a grant of a right of way over a road forty feet wide, and there was power for a person to erect and maintain a porte-cochère or projection extending over the foot pavement of the private road. What the defendant did was to put up an erection that extended beyond the pavement, and went two feet into the carriageway of the private road over which the plaintiffs had a right of way. The question was stated by Lord Coleridge C.J. to be whether in fact what had been done was a substantial interference, and upon the facts, it being decided that it was not any substantial interference, it was held that the plaintiff could not maintain the action. In my opinion that is the true test in such cases, whether the easement has been substantially interfered with. The law is not the same with regard to a private road and a public road. In the case of a public highway there can be no lawful obstruction of the highway, no obstruction which is appreciable. If it is an appreciable obstruction, whether substantial or not, it is a nuisance, and is indictable at common law. *Reg.* v. *United Kingdom Electric Telegraph Co.* (2) was an indictment for putting up telegraph posts. It was tried before Martin B. and he

(1) L. R. 9 C. P. 362.
(2) (1862) 31 L. J. (M.C.) 166, 168.

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gave a ruling as to what he considered the law to be, and upon that the jury returned a verdict of guilty. Then the defendants moved for a new trial on the ground of misdirection with regard to the law laid down by him, and the rule was argued, and refused upon the ground that he had laid down the law correctly. He laid down two propositions. The first I need not deal with. It was a question of the roadway between the fences; the extent of the highway between the fences. The second proposition considered by the Court was a larger one. The learned judge said: "A permanent obstruction erected on a highway, placed there without lawful authority, which renders the way less commodious than before to the public, is an unlawful act and a public nuisance at common law." Then, after dealing with that part of the case, he went on to consider what the effect would be of telegraph posts placed on the green waste by the side of the road, and not affecting either the metalled carriageway or the footpath, so that carriages and foot passengers could pass as conveniently as before over the metalled part and over the foot-path, but there were still the posts at the side of the highway on the green waste. He put it in this way, and it was held to be accurate: "The circumstances that the telegraph posts were not placed upon the hard or metalled part of the highway, or upon a footpath artificially formed upon it, or that the jury might think that sufficient space for the public traffic remained, are immaterial circumstances as regards the legal right, and do not affect the right of the Crown to the verdict." That was an indictment for obstructing a public highway. If that had been merely a private way, a grant of an easement where the grantee had sufficient space for the traffic, and could pass along as freely as before, and there was no substantial interference with his right, the result would have been different. The question that arises in the present case is whether a gate is necessarily an interference. In my opinion it is not. I agree with the view which the Master of the Rolls has expressed, and in the way in which he has expressed it: that a gate of the dimensions he has mentioned would not be an obstruction to the defendant's right of way if it is kept open during business hours and is always unlocked. Such a gate would be no interference with the

reasonable use by the grantee of the easement granted to him by the plaintiff.

The other question refers to fencing the side of the little triangular piece of land. It is a question of construction in a deed granting a right of way whether the way that is granted is a way so that the grantee may open gates, or means of access to the way, at any point of his frontage, or whether it is merely a way between two points, a right to pass over the road, and is limited to the modes of access to the road existing at the date of the grant. In each case it is a question of construction. Assuming in favour of the defendant that he is entitled to open new means of access to this roadway, he is not entitled to have it continuously unfenced along the whole of the line so that at every inch of the way he may pass on to it at any times he pleases. With regard to this part of the case I agree with the view which the Master of the Rolls has already expressed as to what is right and proper to be done with regard to the 16 feet 2 inches on the north side.

As to the costs, there should be no costs on either side in the Court below, but the plaintiff should have the costs of the appeal.

PICKFORD L.J. I am of the same opinion. I do not propose to go through the deed again. The effect of it certainly is this without going into details, that over the blue land which was the property of the plaintiff the defendant had a right of way, and a right of way under circumstances which did not imply the erection of a gate at any part of it. The plaintiff's right to erect a gate there depends upon law, and not upon any implication arising from the circumstances of the case. It seems to me, it being her land, she had a right to do anything upon it that did not substantially interfere with the grant she had made to the defendant. I agree that the law is not the same with regard to a private road as it is with regard to a public road. With regard to a public road the whole space is dedicated to the public, and no part of it can be appreciably interfered with. With regard to a private road, unless there are words otherwise expressing it, there is a right of way granted over that piece of land, the

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dimensions of which are given, but so long as there is reasonable access to the land, and a reasonable opportunity of exercising the right of way, there is not any obstruction to it, and there is no derogation from the grant. What the plaintiff proposes to do here is to put up a gate which we have now been told is to be kept open during business hours, and only to be shut after business hours, and on Sunday, in order to keep trespassers and passers-by from straying on to a piece of land on which they have no right. Such a gate does not seem to me to be an interference with the right which was granted to the defendant. The defendant's contention (I do not mean it was so before us, but it certainly was upon the pleadings) has been that to put a gate there at all would be an obstruction; that the mere putting of posts into the fairway, if I may call it so, of the right of way is an obstruction. That contention I think cannot be maintained. I cannot help thinking that the learned judge rightly apprehended the contention before him on the part of the plaintiff when he considered it as a claim to put a gate there, and maintain a gate there, without any qualification being expressed. I entirely accept Mr. Martelli's statement that there never was any intention to keep this gate shut, but there was no disclaimer of that intention before the learned judge, and the learned judge took it as a claim to erect and maintain a gate without any qualification. That he considered, and I consider also, would imply a claim to deal with the gate as the plaintiff who erected and maintained it wished, and if such a claim was made I am not inclined at the present moment to dissent from the conclusion of the learned judge as to there being an obstruction. But that is not the claim. As I have already said, a claim to erect and maintain a gate which is to be open during business hours is not in my opinion a derogation from the grant of the right of way.

The other question which arises is with regard to the fencing of 16 feet 2 inches of ground along the north side of the right of way extending from a portion of the defendant's building to the gate post of the proposed gate. I do not think it is necessary to decide, but I shall assume for the purposes of this judgment that the grant of the right of way was such a grant as would entitle the defendant to go upon that blue land over which the

right was granted from any portion of his land, but I cannot accept the contention that such a right of way involves also the right to say to the plaintiff "I can go upon it at any moment from every inch of my land which adjoins the right of way, and therefore you cannot put up any fence of any description along that right of way without my permission." In the absence of authority I am certainly not disposed to accept the contention that such an obligation as that is laid upon the servient tenement. I think the obligation is that, assuming the right of access from each part of the land from which access is required to any part of the way, such access shall be given as will be reasonable. It is obviously difficult to explain, but it is an inevitable word, I think. It means such access as will give reasonable opportunity for the exercise of the right of way, or, to put it in another way, such access should be given as will not be a derogation from the grant of the right of way. With regard to this 16 feet 2 inches, I am not at all sure that I should consider, even without that, that there was any substantial interference with the right of way. Looking at the plan, and considering where the public highway of Charminster Road is, and where the footpath of that road is, I am by no means sure that obliging any person to go round the corner of that fence in order to get on to the blue land would be any substantial interference with the exercise of the right of way; but certainly, looking at what is offered, namely, that there should be a gate in that 16 feet 2 inches of fence through which anybody can go who wishes, I am of opinion that there is nothing in what the plaintiff proposes with regard to the fence that is in any way an infringement of the defendant's rights, and therefore I agree as to that also. I agree with Swinfen Eady L.J. that we have not to consider the conduct of either party; we have to consider their legal rights; but I cannot help expressing my regret that some reasonableness on both sides has not prevented the lamentable waste of time and money on this matter.

With regard to the costs, I am not sure that I personally should not have said that each side ought to pay its own costs, but I do not dissent from what has been said by the Master of the Rolls and Swinfen Eady L.J. with regard to them,

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namely that there should be no costs in the Court below, and that the appellant should have the costs of the appeal.

Solicitors: *R. H. Bentley, for Tattersall & Son, Bournemouth; Ford, Lloyd, Bartlett & Michelmore, for Archibald H. Yeatman, Bournemouth.*

H. C. R.

C. A. 1914 ASTBURY J. *June* 19. C. A. *July* 23.

LLEWELLYN *v.* KASINTOE RUBBER ESTATES, LIMITED.

[1914 L. 857.]

Company—Reconstruction—Sale of Assets to New Company in Consideration of Shares—Rights of Dissenting Members—Right of Executors of Deceased Member to dissent—Construction of Articles of Association—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 192.

Executors of a deceased member of a company who have not had his shares registered in their own names have the same right to dissent from a reconstruction scheme adopted under s. 192 of the Companies (Consolidation) Act, 1908, and to restrain the liquidator from carrying out the scheme without purchasing the shares as the deceased member would have had if living.

Articles of association forbidding executors to exercise the rights of a member until they have been registered *held* to refer to the exercise of rights on their own behalf and not on behalf of their testator's estate.

Decision of Astbury J. affirmed.

The Kasintoe Rubber Estates, Limited (hereinafter called the company) was incorporated on March 5, 1910, with a capital of 120,000*l.* in 1*l.* shares. Alfred Broughton Lambe, who died on July 26, 1910, was at his death the holder of 5000 shares. By his will dated June 13, 1910, he had appointed the plaintiffs executors and trustees. Probate of this will was duly registered with the company on December 23, 1910, but the executors did not exercise the power, given them by the articles of association, to be registered, or to have a transferee registered, as owners of the shares.

On September 30, 1910, a final call of 2*s.* 6*d.* a share was made by the directors and paid by the executors.

On November 26, 1913, notices were sent out to the shareholders for extraordinary general meetings to be held on December 4 and 19, 1913, to pass and confirm resolutions for voluntary winding up and the reconstruction of the company under s. 192 of the Companies (Consolidation) Act, 1908, by the sale of the undertaking and assets of the company to a new company in consideration of shares not fully paid up. Notices of these meetings were sent to the plaintiffs, but only, as the liquidator contended, as a matter of courtesy, for executors who had not had their testators' shares registered in their own names were not entitled under the articles to such notices. At these meetings special resolutions were duly passed and confirmed, that the company should go into voluntary liquidation for the purpose of reconstruction according to the scheme, and a liquidator was appointed and authorized to carry out the scheme. The plaintiffs did not vote in favour of the scheme.

On December 20, 1913, the plaintiffs gave notice to the liquidator that they dissented from the special resolution of the company confirmed on December 19, and required him either to refrain from carrying that resolution into effect, or to purchase the interest in the company held by the executors of the will of A. B. Lambe, deceased, at a price to be determined by agreement or by arbitration in manner provided by s. 192 of the Companies (Consolidation) Act, 1908. (1)

The liquidator refused to act upon this notice, stating that he was advised "that this notice does not constitute an effectual

(1) That section gives power to a liquidator in the liquidation of a company, with the sanction of a special resolution, to sell the whole or part of its business and property, and "to receive in compensation or part compensation for the transfer or sale, shares, policies, or other like interests in the transferee company for distribution among the members of the transferor company," but contains the following proviso:—

(3.) "If any member of the transferor company who did not vote in favour of the special resolution at either of the meetings held for passing and confirming the same expresses his dissent therefrom in writing addressed to the liquidator, and left at the registered office of the company within seven days after the confirmation of the resolution, he may require the liquidator either to abstain from carrying the resolution into effect, or to purchase his interest at a price to be determined by agreement or by arbitration in manner provided by this section."

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dissent within the meaning of the section of the Companies (Consolidation) Act referred to for various reasons, amongst others that neither as executors nor as trustees are they members of the company, not having made use of the machinery provided by the articles to enable them to be registered as members, and being therefore precluded by article 37 from exercising any of the rights and privileges of members."

The executors then commenced this action and moved for an injunction.

Article 37 was: "A person entitled to a share in consequence of the death or bankruptcy of a member shall not be entitled to receive notice of or to attend or vote at the meetings of the company, or, save as aforesaid, to exercise any of the rights and privileges of a member, unless and until he shall have elected to be and shall have been registered as the holder of the share."

The other articles of association which referred to the matters in question are set out fully in the judgment of Astbury J.

The motion was heard before Astbury J. on June 19, 1914.

Gore-Browne, K.C., and *Eric Gore-Browne*, for the motion. The Court of Appeal has decided that the estate of a deceased member is a member of a company for the purposes of an article which directed that new shares must be offered to members: *James* v. *Buena Ventura Nitrate Grounds Syndicate.* (1) It must have the same meaning in relation to s. 192. The liquidator will rely on article 37, but according to his construction that article would enable the board of directors to forfeit all the rights of a deceased shareholder. The true construction must be that the executors cannot do these things personally, not that the estate of a deceased member has no rights. Any other construction would make the article ultra vires, for a company cannot by its articles take away rights given to the shareholders by s. 192: *Payne* v. *The Cork Company* (2), following *Baring-Gould* v. *Sharpington Combined Pick and Shovel Syndicate.* (3) Those cases were decided under s. 161 of the Act of 1862, but that is the same as s. 192 of the present Act. It is quite clear that in

(1) [1896] 1 Ch. 456. (2) [1900] 1 Ch. 308.
(3) [1899] 2 Ch. 80, 90.

several places in s. 192 the word "member" must include the estate of a deceased member; e.g., such an estate must be entitled to receive its share of any shares or policies which are to be distributed among the members; and if shares are accepted the executors must do any acts necessary for getting them registered.

Sir Charles Macnaghten, K.C., and *F. Whinney*, for the liquidator. It is suggested that because the liquidator sent notices of the meetings to these executors he had recognized their rights; but that could not be a recognition; the notices were sent as a matter of courtesy to let the executors know what was going on. The executors knew what they had to do and had three years to do it in. They deliberately refused to become members and cannot complain if they have lost any rights by doing so. The object of these articles is to get the right people on the register. Buckley on the Companies Acts, 9th ed. p. 585, says that "provisions are commonly introduced into articles putting upon executors pressure either to transfer their testator's shares, or to become in their own persons proprietors of them, by attaching the penalty of forfeiture to a neglect to do either one or the other within a limited time." These articles have not gone that length, but the passage shews that there is nothing illegal in the articles if they do under certain circumstances lead to forfeiture.

In re Bowling and Welby's Contract (1) shews that deceased members are not members for the purpose of shewing that a company has more than seven members. And they cannot be members for any purpose, for they are excluded by the definition of members in s. 24 of the Companies (Consolidation) Act, 1908. *James* v. *Buena Ventura Nitrate Grounds Syndicate* (2) was merely decided upon the construction of art. 27 of the old Table A. The corresponding article in the new Table A has been entirely altered, shewing that difficulty had arisen from that case. *Allen* v. *Gold Reefs of West Africa* (3) shews that there was no necessity for the liquidator to serve notices on the executors. *Payne* v. *The Cork Company* (4) only decided that a company could not by articles deprive all its shareholders of the

(1) [1895] 1 Ch. 663.
(2) [1896] 1 Ch. 456.
(3) [1900] 1 Ch. 656.
(4) [1900] 1 Ch. 308.

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benefit of s. 161. Here it is plain that the articles have provided that executors of a deceased member shall be excluded from the benefits of s. 192 unless they register. The only question is whether it is ultra vires. On that question the plaintiffs cannot succeed unless they make out that "member" in s. 192 includes deceased members. It does not, and having regard to the definition of "member" in s. 24 it could not include them.

Gore-Browne, K.C., in reply.

ASTBURY J. This is a motion that the liquidator may be restrained from carrying into effect a reconstruction scheme and parting with the assets of the company thereunder unless and until the applicants' interest as dissentient shareholders has been purchased, under the provisions of s. 192 of the Act. A Mr. Lambe was the registered holder of 5000 shares in this company. He died on July 26, 1910. The applicants, Mr. Llewellyn and Mr. Hilliers, are his executors, and notice of his death and the appointment of his executors was entered upon the register of members, but the executors were never registered in respect of his shares. At the date of his death the shares were only partly paid, and a call was made upon his executors. The shares were then paid up in pursuance of the call, and on December 4 and 19, 1913, respectively, winding-up resolutions were passed by the company for the purpose of carrying out the reconstruction scheme. Notices of the meetings were sent to the executors. On December 20, 1913, a notice of dissent was sent to the liquidator in respect of the scheme, and on April 4 following he wrote to the executors objecting to the notice as an ineffectual dissent within the meaning of the Act. The question is whether under the circumstances the executors, in respect of the estate of the deceased shareholder, are entitled to be treated as dissenting members within s. 192. Before dealing with the section of the Act, I will refer shortly to the articles in respect of which principally the objection is made on behalf of the liquidator. Article 33 reads: "In the case of the death of a member, the survivors or survivor, where the deceased was a joint holder, and the executors or administrators of the deceased where he was a sole holder shall be the only persons

recognised by the company as having any title to his shares; but nothing herein contained shall release the estate of a deceased joint holder from any liability in respect of any share jointly held by him." Article 34 is: "Any person becoming entitled to a share in consequence of the death or bankruptcy of any member may, upon such evidence of title being produced as may from time to time be required by the board, be registered as a member or may elect to have some person nominated by him registered as transferee thereof." Article 35 is: "If the person so becoming entitled shall elect to be registered himself, he shall deliver or send to the company a notice in writing signed by him, stating that he so elects. For all purposes of these presents relating to the registration of transfers, such notice shall be deemed to be a transfer, and the board shall have the same power of refusing to give effect thereto by registration as if the death or bankruptcy of the holder of the share had not occurred and the notice were a transfer executed by such holder." Then by article 37, which is the principal article, "A person entitled to a share in consequence of the death or bankruptcy of a member shall not be entitled to receive notice of or to attend or vote at meetings of the company, or, save as aforesaid, to exercise any of the rights and privileges of a member, unless and until he shall have elected to be and shall have been registered as the holder of the share." And by article 130: "The board may retain the dividends payable upon shares or stock in respect of which any person is under the articles relating to the transmission of shares entitled to become a member or which any person under those articles is entitled to transfer, until such person shall become a member in respect thereof or shall duly transfer the same." The applicants did not give notice electing to be registered, and they were not in fact so registered at the date of the winding-up resolutions. After the shareholder's death, the company duly sent to the executors notices of meetings in accordance with the articles, and on or about November 27 a notice was received by the executors from the company of the extraordinary meetings of the company at which the winding-up resolutions were passed.

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The point that I have to decide may be put thus: was the estate of this deceased shareholder, at the date of the winding-up resolutions, a member entitled to dissent within s. 192, sub-s. 3, of the Companies (Consolidation) Act, 1908. The applicants contend that under that section, and having regard to the context contained in it, and in other portions of the Act, the estate of this shareholder must be deemed to have been a member at the date of the liquidation resolutions, and that the notice of dissent sent on behalf of that estate by the applicants was a good dissent. They further contend that if and to the extent that article 37 disentitles the estate to take up that position it is ultra vires under the decision in *Payne* v. *The Cork Company*. (1) The liquidator, on the other hand, contends that this estate was not a member within the meaning of s. 192, sub-s. 3, and, secondly, that if it was, the executors are not entitled to exercise any rights and privileges in respect of it under article 37 unless and until they have elected to be and shall have been registered as holders of the shares. This is an important matter, and it is curious that no reported case appears to exist upon the subject. It is obvious, I think, that there must have been a great number of cases where a winding-up for the purpose of reconstruction has taken place, where certain members of the company have previously died and the names of their executors have not been entered on the register in respect of their shares.

On behalf of the applicants it is said, and I think with force, that reading s. 192 it is clear that for many purposes of that section the estate of a deceased member must be a member of the company within the meaning of that expression. In sub-s. 1, after referring to the transfer of the property of the company in question to another company, it refers to the receipt by the liquidator, in compensation or part compensation for the transfer or sale, of shares, policies, or other like interests in the transferee company for distribution among the members of the transferor company. It seems to me perfectly plain that, if at the date of the sale in question one or more shareholders of the transferor company had then died, his or their estate or estates would plainly be entitled to these

(1) [1900] 1 Ch. 308.

distributive shares of the assets in question, under the words "for distribution among the members of the transferor company." Under sub-s. 2 it is provided that "Any sale or arrangement in pursuance of this section shall be binding on the members of the transferor company." Unless the estates of deceased shareholders are deemed to be members within the meaning of that sub-section, the effect of the Act would be that executors of deceased shareholders could upset these arrangements by reason of their not being binding upon their estates. Then coming to the sub-section which is directly in point, the words are: "If any member of the transferor company"—and in my opinion in this sub-section and in the two previous sub-sections that must include "estate of a deceased member"—"who did not vote in favour of the special resolution at either of the meetings held for passing and confirming the same expresses his dissent therefrom in writing addressed to the liquidator, and left at the registered office of the company within seven days after the confirmation of the resolution, he may require the liquidator either to abstain from carrying the resolution into effect, or to purchase his interest at a price to be determined by agreement or by arbitration in manner provided by this section." In this particular case, the fact that the shareholder died three years before the resolution was passed must, I think, be disregarded. I must construe the Act as well with reference to the case of a shareholder dying immediately prior to the passing of the resolutions and at a time which would leave his executors no opportunity of electing to be and becoming registered as holders of their testator's shares prior to the expiration of seven days required by sub-s. 3 as to one dying earlier. I do not think it can be held that the meaning of this statute is that in a case of that kind the estate of a deceased shareholder should be ignored. That the estate of a dead shareholder may be deemed to be a shareholder or a member within the meaning of the Act for certain purposes is I think plain from the case of *James* v. *Buena Ventura Nitrate Grounds Syndicate.* (1) In that case it is quite true that all the Court had to do was to construe the effect of art. 27 of the then

(1) [1896] 1 Ch. 456.

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Table A, which provides: "Subject to any direction to the contrary that may be given by the meeting that sanctions the increase of capital, all new shares shall be offered to the members in proportion to the existing shares held by them," and there was no provision such as the articles 33 to 37 of this company. But apart from that, the Court held that "member" in that article included the estate of a deceased shareholder. Lord Herschell said (1): "It is no doubt the fact that, strictly speaking, although Mr. James's name was, at the time of the resolution of April, 1893, still on the register, he was not, being dead, a member of the company. It seems to me, however, perfectly clear that the word 'member,' as used in some of the articles of the company, must be held to include those whose names are on the register, though they are no longer living." And, after referring to the article, his Lordship says: "For this purpose the deceased member must still be regarded as a member within the meaning of the article. In a somewhat similar case the late Lord Justice James said: 'the estate is the member.'" Then his Lordship says: "Again, where a liability arises with respect to the shares—as, for example, where a call is made on the 'members'—it seems equally free from doubt that the liability attaches to the estate of the deceased member." Rigby L.J. gives judgment to the same effect.

In the present case it is perfectly plain that, according to the articles of this company, for many purposes the estate of a deceased shareholder must be a member, and within the meaning of the articles. I will only refer to one or two of the articles. Under article 18: "The board may from time to time make such calls upon the members as they think fit in respect of the amounts unpaid on the shares held by them respectively." Article 21 says: "If any member shall fail to pay on or before the day appointed for payment thereof any call or instalment to which he may have become liable, he shall pay interest on the amount in arrear from the day appointed for payment thereof to the time of actual payment, at such rate, not exceeding 10 per cent. per annum, as the board may from time to time fix, and in case no other rate be prescribed, then at the rate of 10 per cent.

(1) [1896] 1 Ch. 464.

per annum, provided, however, that the board may remit the whole or any part of such interest." Article 22 says: "The board may, if they think fit, receive from any member willing to advance the same all or any part of the moneys due upon the shares held by him beyond the sums actually called up thereon." In all those cases the word "member" would include, and must include for the purposes of the articles, the estate of a deceased shareholder. Under article 24 the provision is: "The company shall have a first and paramount lien and charge on all the shares (other than fully paid up shares) registered in the name of a member . . . . for all moneys due to the company from him or his estate." "Member" is used in that article as including a dead man. Under article 153: "Any notice or document delivered or sent by post to, or left at, the registered address of any member, shall notwithstanding such member be then deceased" and so on. There, again, the word "member" is used in the wider sense. Under the statute itself, I think it is equally clear that in many sections the word "member" must include, for the purposes of the Act, the estate of a deceased member. I may refer, as an example, to s. 186, sub-s. 1: "The following consequences shall ensue on the voluntary winding up of a company:—(1.) The property of the company shall be applied in satisfaction of its liabilities pari passu, and, subject thereto, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company." It is clear that the estate of a deceased member is entitled to its distributive share. The same thing applies to articles 123, 124, and 126. For the above reasons the expression "member" in s. 192, sub-s. 3, does in my opinion include the estate of a deceased member as contended for by the applicants.

The second matter to be decided is whether there is anything in the articles of the present company which prevents me giving effect to this view. Of late years provisions have often appeared in companies' articles putting upon executors pressure either to transfer their testators' shares, or become in their own persons proprietors of them, by attaching a penalty of forfeiture for neglecting to do either the one or the other within a limited

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time. Apart from any question of the validity of attempting to attach such forfeiture, and assuming that such an article is valid, the question is whether article 37 in this case provides for anything of the kind. In my opinion it does not. The articles provide for the method in which the executors of a deceased shareholder may elect to be themselves registered or to nominate some other person as transferee in respect of their testator's shares. Article 37 provides that "A person"—that would include the executors in the present case—"entitled to a share in consequence of the death or bankruptcy of a member shall not be entitled to receive notice of or to attend or vote at meetings of the company, or, save as aforesaid, to exercise any of the rights and privileges of a member, unless and until he shall have elected to be and shall have been registered as the holder of the share." Now it is contended that the exercise of a right of a dissentient under s. 192, sub-s. 3, is an exercise of a right or privilege of a member, and that it is covered by article 37, and that these executors cannot in consequence exercise the right of dissent in this case. Even assuming that I am right in the construction that I think ought to be put upon s. 192 and other sections of the Act, I do not think that is the meaning of this article.

It is not purporting to deal with the rights of deceased shareholders as such, but with the rights of executors or other persons entitled to the shares in question in consequence of death in respect of the exercise by them of rights and privileges of members. In the present case the executors have not, in my judgment, attempted to exercise any right or privilege of members in their own behalf, but they have given this notice of dissent on behalf of the estate of the deceased shareholder; and, giving the article the best attention I can, I do not think that that falls within its true construction.

It is further contended by the applicants that if such were (contrary to my view) the true construction of article 37, it would take away the rights of dissentient shareholders, and, as such, would be ultra vires according to the decision in *Payne* v. *The Cork Company*. (1) It is not necessary to discuss this further, because in my view that is not the meaning of the article. I

(1) [1900] 1 Ch. 308.

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ought to refer, perhaps, before leaving the question, to the decision in *In re Bowling and Welby's Contract* (1), which is relied upon by the liquidator for the purpose of contending, and, as I think, wrongly, that "member" in s. 192 must be limited to a living shareholder. In that case the company was an unregistered company, and could not be wound up under s. 199 of the Act of 1862 unless there were more than seven existing members at the date of the winding-up petition. The Court of Appeal there held that that meant seven living members. Lord Halsbury said (2): "The statute itself draws a distinction between past members, who may be contributories, and actual members. I cannot give a construction to the statute which would call upon me to import into the section the words, 'members who are either now or have at one time been members.'" Stopping there for a moment, as far as I can judge from s. 192, the opposite is the fact there having regard to the context in the section itself. Lindley L.J. in his judgment, I think, makes it clear that what he is dealing with, for the purpose of deciding that particular case, is the meaning of "members" applicable to the various kinds of unregistered societies which might be wound up under the old Companies Act. At all events, I do not think that that case really governs the present. I have to decide this case as best I can on the construction of the section in question, and in my judgment s. 192 does include this estate, and there is nothing in the articles of this company which excludes the estate so included from exercising the rights of a dissentient member within s. 192.

J. R. B.

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Against this decision the liquidator appealed. The appeal was heard on July 23, 1914.

Sir Charles Macnaghten, *K.C.*, and *F. Whinney*, for the appellant.

Gore-Browne, *K.C.*, and *Eric Gore-Browne*, for the respondents.

The arguments addressed to the Court below were repeated,

(1) [1895] 1 Ch. 663. (2) [1895] 1 Ch. 667.

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the following additional authorities being referred to: *Baird's Case* (1); *Duff's Executors' Case* (2); *In re Peveril Gold Mines.* (3)

SWINFEN EADY L.J. This is an appeal from an order of Astbury J. restraining the defendant company and the liquidator from acting upon or carrying into effect the special resolutions proposed and carried at two extraordinary meetings of the company and carrying out the agreement therein mentioned unless they should in the meantime have purchased the interest of the plaintiffs in the company pursuant to s. 192 of the Companies (Consolidation) Act, 1908. The question between the parties is quite a short one, and the facts are not in dispute. A gentleman named Lambe was a shareholder in the company holding 5000 1*l.* shares. He died in July, 1910. At the date of his death these shares were partly paid, 17*s.* 6*d.* being paid, and after the death there was a call of 2*s.* 6*d.* per share, amounting on these 5000 shares to 625*l.* This was paid by the plaintiffs, who were the executors of the deceased, and the shares were then fully paid. The plaintiffs duly proved the will of the deceased and lodged the probate for registration with the defendant company, but they never became shareholders themselves in the company or members of the company or asked to be registered in their own names, but were content to leave these fully-paid shares in the name of the deceased with a note of the probate in the books of the company.

That was the position in 1910. In 1913 the company was minded to pass resolutions for a winding-up with a view to reconstruction. On November 1 notices were sent out, and in December two extraordinary meetings were held, at which the special resolutions were duly passed and confirmed. On December 20, the day after the second resolution was passed, the plaintiffs as executors of the deceased served notice of dissent under s. 192. There is no question as to the form of the notice, which was proper under the statute, and required the liquidator either to abstain from carrying the resolution into effect or to purchase their interest at a price to be determined by agreement

(1) (1870) L. R. 5 Ch. 725. (2) (1886) 32 Ch. D. 301.
(3) [1898] 1 Ch. 122.

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or by arbitration. Now the contention is that the plaintiffs, being only executors of a deceased member, were not entitled to serve notice under s. 192. Accordingly the defendant company treated the notice as invalid, and the executors thereupon started this action to restrain the company from acting upon the resolutions. Astbury J. granted an injunction as asked, and the defendant company appeals.

The question raised is, are the plaintiffs as executors entitled to this injunction, which depends on the question whether they have the right to dissent. It is beyond dispute that the word "member," used in the statute of 1908 and in the articles of association of this company, is used sometimes as referring to a member on the register, and also sometimes as including and extending to a deceased member and the estate of a deceased member. It is beyond dispute that the word bears from time to time one or both of those meanings, and sometimes one and sometimes the other. The question is, therefore, does it in s. 192, sub-s. 3, include the estate of a deceased member? Sect. 192, sub-s. 1, provides that, on a company transferring its property on a winding-up, the liquidator may receive, in consideration or part consideration for such transfer or sale, shares, policies, or other like interests in the transferee company for distribution among the members of the transferor company, or may enter into an arrangement whereby the members of the transferor company may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the transferee company. In sub-s. 1 it is clear that the words "members of the transferor company" do include a deceased member's estate as well as a living member. "Distribution among the members" &c. extends to the estates of deceased members—that is not disputed. Then sub-s. 2 provides that any sale or arrangement in pursuance of this section shall be binding on the members of the transferor company. This obviously extends to deceased members' estates, which are to be bound by a sale pursuant to the section: such a sale is to be binding on the deceased as well as on the living members. Then there is sub-s. 3. It would be strange, in a section which provides for distribution of proceeds of sale

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amongst members, including deceased members, and for deceased members being bound by such sales, and where there is provision for the raising of objections to such sales, or requiring the interest of the dissentient member to be purchased, if this provision did not extend to deceased members and the estates of deceased members. It is said in this case that the sub-section can only refer to living members because it provides for the member not voting for the resolutions, and it is said that unless there is a living member there is no right to attend meetings and vote. But the estate of a deceased member can never have voted for the resolution, as the executors have no right to attend the meetings.

On the question whether in such a case executors have a right to require their interest to be purchased, I think some light is thrown upon the way in which this section should be interpreted by the case of *James* v. *Buena Ventura Nitrate Grounds Syndicate* (1), where the question was whether a deceased member was entitled to participate in new shares which were being created. Rigby L.J. says (2): "Speaking generally, the executors of a deceased member of a limited company as representing his estate are entitled to all the profits and advantages attaching to the shares belonging to their testator and subject to all the incidental liabilities, although in terms such profits, advantages, and liabilities would seem to attach to members only." The provision of sub-s. 3 is an advantage attaching to the shares, enabling a request to be made to the liquidator to purchase the shares at a price to be determined by agreement or arbitration. Sect. 192, sub-s. 1, therefore in my opinion extends to deceased members and enables a request to be made to purchase the interest of dissentient members, and is to be applied as well to deceased as to living members.

Then it is said, if this is so, the plaintiffs are excluded by article 37. But if they have a statutory right, they could not be excluded by the articles of association. In *Baring-Gould* v. *Sharpington Combined Pick and Shovel Syndicate* (3) it was alleged that certain provisions in the articles of association amounted to an "agreement" so as to exclude a member from

(1) [1896] 1 Ch. 456. (2) [1896] 1 Ch. 466.
(3) [1899] 2 Ch. 80.

statutory rights, but it was held otherwise, and Lindley M.R. said (1): "Any contrary interpretation of that section would come to this, that the company could by the articles of association made beforehand—before there was any dispute with a dissentient member—bind all the members, and deprive them of the benefits conferred on them in the event of their becoming dissentient members under s. 162. I do not think this can be done by the articles of association." If the company could not by the articles of association exclude all the members from the rights conferred by the section it will not be open to them to exclude any class of members who might be dissentient.

But I do not think that the plaintiffs are excluded, according to the true construction of article 37. The true construction is that any person entitled to a share in consequence of the death or bankruptcy of a member shall not be entitled to attend or vote at meetings of the company, or exercise any of the ordinary privileges of membership, such as requisitioning a meeting, or forming one of a quorum, or to claim in respect of those shares to be qualified as a director. The article would exclude him from such rights or privileges, but would not preclude him from receiving every advantage to which the shares entitled him. He would be entitled thus to receive dividends, bonuses, and the like, and, as it was an advantage attaching to the shares, he would be entitled to requisition the liquidator either to buy out his interest, or to abstain from carrying the resolutions into effect. For these reasons the appeal fails and must be dismissed.

PICKFORD L.J. I agree and have nothing to add.

Appeal dismissed.

Solicitors for appellant: *Stephenson, Harwood & Co.*
Solicitor for respondents: *M. A. Orgill.*

(1) [1899] 2 Ch. 90.

G. A. S.

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[Manchester District Registry.]

JACKSON *v.* KNUTSFORD URBAN DISTRICT COUNCIL.

[1914 J. 316.]

Local Government — Unhealthy Dwellings — Obstructive Building — Pulling down—Separate Workshop — "Building" — Housing of the Working Classes Act, 1890 (53 & 54 *Vict. c.* 70), *ss.* 38, 41—*Housing, Town Planning, &c., Act*, 1909 (9 *Edw.* 7, *c.* 44), *s.* 46 *and Sched. II.*

Sect. 38 of the Housing of the Working Classes Act, 1890, is not confined in its operation to buildings designed for human habitation.

A building (not a dwelling-house or any part of a dwelling-house within the definition contained in s. 29 of the Housing of the Working Classes Act, 1890, as amended by s. 49 of the Housing, Town Planning, &c., Act, 1909) constructed for and used solely as a cycle makers' and mechanics' workshop:—

Held, a "building" within s. 38 of the Act of 1890, as amended by s. 46 and Sched. II. of the Act of 1909, and capable of being dealt with by the local authority as an obstructive building under that section.

Witness Action.

The plaintiffs, Jackson Brothers, were the owners and occupiers of certain premises No. 38, Princess Street, Knutsford, and of a brick building situated at the rear of the premises. The brick building was used by the plaintiffs as a cycle makers' and mechanics' workshop and was so constructed and adapted as to be used for the purpose of a workshop and for no other purpose. It was separated from the rest of the premises and was solely used for business purposes.

The defendants were, under the Housing of the Working Classes Act, 1890, s. 92 and Sched. I., the local authority for the urban district of Knutsford charged with the execution of the Housing of the Working Classes Acts, 1890 to 1909.

In pursuance of their statutory duties and powers under the Acts (1), and particularly purporting to exercise the provisions of s. 38 of the Act of 1890, the defendants, upon a representation by the medical officer of health for the district that the workshop was an obstructive building within the meaning of s. 38 of the Act of 1890 as amended by s. 46 and Sched. II. of the Housing,

(1) See note at end of report.

Town Planning, &c., Act, 1909, and on a report of the district surveyor, and after notice to and communication with the plaintiffs, made an order to pull down a portion (the plaintiffs objecting that it was not necessary to pull down the whole) of the building.

Notice of the order was given to the plaintiffs, who took no steps to appeal against it.

By a subsequent notice the defendants, purporting to act in accordance with the provisions of sub-s. 4 of s. 38 of the Act of 1890, gave notice to the plaintiffs that they intended to purchase the land on which the building stood.

The plaintiffs then, under sub-s. 5 of s. 38, gave notice to the defendants that they desired to retain the site of the building and would undertake to pull down or allow the defendants to pull down the building on receiving compensation under the Acts.

Negotiations took place as to the amount of the compensation, and ultimately the defendants gave the plaintiffs notice that if the amount which they offered were declined they would apply to the Local Government Board to appoint an arbitrator to settle the amount, under s. 41.

The plaintiffs thereupon, alleging that the brick building was not a "building" within the provisions of ss. 38 and 41, and that the defendants were acting ultra vires, commenced this action for (*a*) a declaration that they were entitled to the undisturbed and free enjoyment of the brick building and that they were entitled to the enjoyment thereof in its then present position and condition and without let or hindrance by the defendants, their servants or agents; (*b*) alternatively, an injunction to restrain the defendants, their servants or agents, from trespassing on the workshop and from taking steps to demolish it either wholly or in part.

F. Brocklehurst, for the plaintiffs. The question is mainly one of the construction of the Housing of the Working Classes Act, 1890, s. 38. (1) The plaintiffs' contention is that the council were acting ultra vires in deciding that the workshop was an obstructive building within that section. The Act is there dealing

(1) See note at end of report.

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with dwelling-houses and not with business premises, which this workshop is. The Act contains no provision for compensation in respect of business premises of this description and was not meant to apply to such (s. 41). "Dwelling-house" is defined in s. 29 of the Act of 1890, as amended by s. 49 of the Housing, Town Planning, &c., Act, 1909. It means any inhabited building. The Act of 1909 does not expand the meaning of dwelling-house into a workshop: *Robertson* v. *King* (1); *Richards* v. *Swansea Improvement and Tramways Co.* (2)

E. Sutton, for the defendant council. The plaintiffs are estopped by their conduct from disputing the validity of the acts of the council. The matter was the subject of an agreement between the parties, and the plaintiffs had full knowledge of the steps which were taken. There was a general arrangement and the compensation was agreed by all except the plaintiffs. At any rate the plaintiffs so acted as to lead the defendants to believe that there was a concluded agreement and to change their position and act accordingly: *Thomas* v. *Daw* (3); *Lynch* v. *London Commissioners of Sewers*. (4) Both those cases were under Michael Angelo Taylor's Act, 1817 (57 Geo. 3, c. xxix.), but they shew the principle which is to be followed. If the plaintiffs were not satisfied and thought the defendants were doing wrong, they ought to have appealed to the Local Government Board (substituted for quarter sessions by the Housing, Town Planning, &c., Act, 1909): *Rayner* v. *Stepney Corporation*. (5)

Upon the construction of the Act of 1890, read with the Housing, Town Planning, &c., Act, 1909, the defendants are right. This workshop is an obstructive building. An "obstructive building" is entirely different from an unhealthy house. *Thompson* v. *Sunderland Gas Co.* (6) shews what may be held a "building": *Merrick* v. *Liverpool Corporation*. (7)

Before 1890 no enactment similar to that of s. 39 of the Housing of the Working Classes Act of that year existed. The Artizans and Labourers Dwellings Improvement Act, 1875

(1) [1901] 2 K. B. 265.
(2) (1878) 9 Ch. D. 425.
(3) (1866) L. R. 2 Ch. 1.
(4) (1886) 32 Ch. D. 72.
(5) [1911] 2 Ch. 312.
(6) (1877) 2 Ex. D. 429.
(7) [1910] 2 Ch. 449.

(38 & 39 Vict. c. 36), was the first statute containing provisions relating to insanitary dwellings. It did not give the owner any right to retain the land. It was followed by the Artizans and Labourers Dwellings Improvement Act, 1879 (42 & 43 Vict. c. 63), which (s. 3) dealt with the assessment of the measure of compensation payable under an improvement scheme in respect of any house or premises situate within an unhealthy area. That was the statutory position until 1890 in regard to insanitary areas. In 1882 the Legislature, by the Artizans Dwellings Act of that year (45 & 46 Vict. c. 54, s. 2 and Part II.), combined the legislation in regard to unhealthy houses and insanitary areas. There was nothing in the Act of 1882 to deprive an owner whose land was taken of compensation under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18). The Artizans and Labourers Dwellings Act, 1868 (31 & 32 Vict. c. 130), which was passed to provide better houses for artizans and labourers, did not provide compensation for the demolition of insanitary buildings (ss. 5, 9, 18, 20). The Artizans and Labourers Dwellings Act (1868) Amendment Act, 1879 (42 & 43 Vict. c. 64), provided compensation where the owner required the local authority to purchase the premises (ss. 5, 7). By the Artizans Dwellings Act, 1882, "obstructive buildings" were brought in, and there was nothing to limit the amount of compensation under the Lands Clauses Acts.

The Housing of the Working Classes Act, 1890, introduced, by s. 39, a scheme of improvement on two grounds. That section does not deal with any "obstructive buildings" or anything that is dealt with under s. 38. Nothing is enacted in the provisions of s. 39 in regard to s. 38. Sects. 32 and 33 deal with insanitary dwelling-houses unfit for human habitation. Sect. 38 stands on a different footing from anything else in the Act. The words of sub-s. 7, "house or manufactory," as amended by s. 46 and Sched. II. of the Housing, Town Planning, &c., Act, 1909, into "house or other building or manufactory," are the same as are used in s. 92 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18). Sect. 38 is a scheme of itself, dealing with obstructive buildings. A local authority who are proceeding under it (as the defendants were) are proceeding in a way that is most advantageous to an owner.

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It would be a very unusual course for the Court to interfere in such a case as this by injunction.

F. Brocklehurst in reply. The defendants' main contention seems to be that the plaintiffs do not come within s. 41, sub-ss. 2—6, at all. Under s. 34 the owner of a building ordered to be demolished can get no compensation unless he comes within the miniature improvement scheme of s. 39. Sub-clause (*b*) of sub-s. 1 of s. 39 deals with different property from that dealt with by an order for demolition. For demolition there is no compensation; for an improvement scheme there is. There are only two cases for compensation under s. 39. Then, when s. 41 is arrived at, there are the two under s. 39 and one other. Sect. 41 deals not merely with houses unfit for human habitation. It does deal with properties under s. 38. Sect. 38 is dealt with by s. 41; indeed, the Act directs it.

As to the plaintiffs not having appealed against the order to pull down, the course they have adopted is the simplest and most efficacious that could have been followed. They found that the local authority were acting outside their powers, and they came at once to the Court. That was better than going a roundabout way by the Local Government Board. If the proceedings of the local authority were from the beginning ultra vires, as the plaintiffs say they were, nothing that the plaintiffs did could prevent them from turning round and alleging them to be so. The local authority are not thereby put in any worse position than they would have been in originally. It was they who made representations to the plaintiffs, not the plaintiffs to them. The local authority represented that they were acting properly. In *Thomas* v. *Daw* (1) there was an agreement. There has been none here. The plaintiffs ought not to be held to be estopped.

EVE J. Two questions arise for decision in the action, the one and the more important whether a certain building situate at the rear of a house and shop known as No. 38, Princess Street, Knutsford, belonging to the plaintiffs, is a "building" within the meaning of s. 38 of the Housing of the Working Classes Act, 1890, and the other whether, assuming it not to be such a

(1) L. R. 2 Ch. 1.

"building," the plaintiffs are in the circumstances disclosed by the evidence estopped by their conduct from successfully claiming an injunction to restrain the defendants from proceeding to deal with the structure as if it were in fact a "building" within the section.

The building in question is not a dwelling-house or any part of a dwelling-house within the definition contained in s. 29 of the Act of 1890 as amended by s. 49 of the Housing, Town Planning, &c., Act, 1909. (1)

The plaintiffs submit that the structure is not capable of being treated as an "obstructive building" within s. 38 of the Act of 1890. (1) Their case was summed up by counsel in these words: "A building of this kind, separately used as a workshop and so constructed as to be incapable of being used for any other purpose than as a workshop, cannot be ordered to be removed as an obstructive building under s. 38." The logical result of the reasoning by which this conclusion is arrived at would be that no building which is not a dwelling-house within the Act can be ordered to be removed under s. 38.

The Act of 1890 was passed to consolidate and amend the Acts relating to artisans' and labourers' dwellings and the housing of the working classes. It wholly repealed thirteen prior Acts and partly repealed two others. Its paramount object is the substitution of healthy and sanitary dwellings for unhealthy and insanitary ones, and to secure this end it imposes onerous duties upon local authorities and confers upon them adequate powers to enable them to discharge those duties. Part I. of the Act deals with cases where the conditions of some defined area within any district are such as to be dangerous or injurious to the health of the inhabitants either of the buildings in the area or of the neighbouring buildings, and contains provisions whereby the defects of such unhealthy areas may be effectually remedied by an improvement scheme for the rearrangement and reconstruction of the streets and houses within the area. Part II. of the Act, the part of the Act with which we are now concerned, deals, subject to one exception, not with unhealthy areas made up of an aggregation of insanitary dwelling-houses, but with separate and individual dwelling-houses, and it provides for the closing

(1) See note at end of report.

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and demolition of dwelling-houses unfit for habitation and the removal of any building the continued existence of which by reason of its proximity to other buildings (*a*) interferes with the ventilation of those other buildings, or (*b*) conduces to render them unfit for human habitation, or (*c*) prevents proper measures being taken for remedying any nuisance injurious to health. It is with these last mentioned provisions that the present litigation is concerned. I shall return to them later.

But before doing so I pause to point out that the exception to which I referred just now is to be found in s. 39 (1), which does deal with an aggregation of unhealthy dwelling-houses (including houses closed by closing order) as distinct from single dwelling-houses, but with an aggregation the site of which is too small to be dealt with as an unhealthy area under Part I. of the Act. The importance of noting s. 39 lies in this, that, although no compensation is payable to the owner of a dwelling-house closed and demolished as unfit for human habitation under the earlier sections of Part II. of the Act, compensation is payable to such an owner if the local authority elect to take the house under s. 39, and this fact may explain the presence in s. 41 of certain provisions on which counsel for the plaintiffs has relied in support of his argument that s. 38 is confined in its operation to buildings designed and fit for human habitation.

Sect. 38, sub-s. 1, is in these terms: [His Lordship read the sub-section. (1)] Pausing there, counsel for the plaintiffs relies strongly on the parenthetical phrase at the beginning of the section, "although not in itself unfit for human habitation," as an indication that the words "any building" ought not to be read in their widest sense, but ought to be limited to buildings capable of being used for human habitation, that is to say, as equivalent to the words "any dwelling-house." "How," he asks, "are such words appropriate if the antecedent 'any building' is so construed as to include buildings never meant and in no way fitted for human habitation?" If the matter fell to be decided solely on the opening words of the section I think there might be difficulty in determining what the section is meant to deal with, but in construing a section of an Act of Parliament one

(1) See note at end of report.

cannot take a single passage and isolate it from the rest of the section or the other parts of the Act; one must examine all the context to see what the true meaning of the passage is, and all the more so if the passage itself is ambiguous in its terms. The next sub-sections provide what is to be done when the medical officer of health has reported that it is expedient that the obstructive building should be pulled down. The local authority must inquire into the matter and determine whether effect should be given to the medical officer's report or not, and in making that inquiry the authority is bound to hear any objections the owner may urge against an order being made. If an order is made for the pulling down of the obstructive building and is not appealed against, or, having been appealed against, is affirmed, the local authority is then empowered under sub-s. 4 to purchase the land on which the obstructive building is erected, and if it elects to exercise this power the purchase price is to be ascertained under the appropriate provisions of the Lands Clauses Acts, as modified by the provisions of the Act with which I am now dealing, and which is to be deemed as to Part II. to be the special Act. But the owner is not bound to sell the site of the obstructive building; by sub-s. 5 he is entitled, within a limited time after notice to purchase the same has been served, to declare that he desires to retain the site, and if he so declares then his right to receive compensation from the local authority is limited to the right to receive compensation for the pulling down of the obstructive building.

It will perhaps be convenient if I deal here with an argument which suggested itself to my mind on first reading this section and which was put to me by counsel for the plaintiffs. It is that the position of the owner in this matter of compensation is different in cases where he allows the local authority to acquire the site from what it is in cases where he elects to retain the site and claims compensation only for the pulling down. It is suggested that in the former case some different method of arriving at the compensation payable would be adopted from that which would be adopted in the latter case, the suggestion being founded on the introductory words of sub-s. 6. But in my opinion there is no substance in this; it would, I think, be contrary to common

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sense to hold that any different rule ought to obtain for assessing compensation in the two alternative cases of the owner agreeing to sell and wishing to retain the site. The subject-matter for which the compensation is payable is different, but in each case the manner and principles in and upon which the compensation is determined must, in my opinion, be the same. The sub-section which I have now reached—sub-s. 6—provides that the amount of compensation is to be settled, in case of difference, by arbitration in manner provided in Part II. of the Act, and counsel for the plaintiffs rightly says that this sub-section necessitates a reference to s. 41, in which section are to be found a variety of provisions, some admittedly applicable to any arbitration under the Act, whatever the subject-matter of such arbitration is, and others applicable only to arbitrations concerning dwelling-houses. In the former of these two categories is sub-s. 1, which provides for a single arbitrator, to be appointed and removable by the Local Government Board. So also are sub-ss. 7 to 11 inclusive, dealing with the possible contingencies of the death, removal, or resignation of the arbitrator, and the appointment of another in his place, and certain other more or less formal matters which follow on the making of the award. In the latter of the two categories are sub-ss. 2 to 6, and counsel for the plaintiffs argues that, inasmuch as these are really the important sub-sections of s. 41 and inasmuch as they can have no applicability to such a building as we are here dealing with, there is a strong presumption raised that the Legislature never contemplated that such a building would ever be the subject of an arbitration under this Act. As against that argument I must revert to s. 38 and refer to an important provision which is to be found in sub-s. 7 thereof.

Before reading that sub-section, I may say that I agree that, if the meaning of the introductory words of the section was clear and unambiguous, the ambiguous wording of a sub-section could not be invoked to alter or control the meaning of the introductory words, but an ambiguity in the introductory words can certainly be removed by the more precise language of a sub-section.

Sub-s. 7, which for the purposes of this Act modifies the

Lands Clauses Acts, has been amended by s. 46 and Sched. II. of the Housing, Town Planning, &c. Act, 1909, and as so amended reads as follows: [His Lordship read sub-s. 7 as amended. (1)] I think that sub-section throws great light upon what was contemplated by s. 38 and materially assists in determining its true construction. The introductory words of the section are not so clear and unambiguous as to be incapable of being controlled, and their true meaning ascertained, by the language and scope of the subsequent sub-sections, and, in my opinion, this sub-s. 7 shews that the introductory words of the section ought not to be read in the restricted sense for which the plaintiffs contend. The expression "any building" is wide enough to cover buildings of all descriptions, dwelling-houses, manufactories, places of worship, and even statues and monuments, and in my opinion all these come within the section. If the obstructive building is not a dwelling-house, then the arbitrator in any arbitration for fixing compensation is not entitled in settling the amount of compensation to take into account any of those matters which he is bound to take into account if the obstructive building is a dwelling-house. In other words, different considerations apply to cases where the obstructive building is a dwelling-house and to cases where it is not a dwelling-house. It may well be that the Legislature thought that the owner of an obstructive dwelling-house could be adequately compensated by being paid the fair market value of the house, but that in the case of a factory or of premises used only for business purposes something beyond fair market value might have to be paid, and that the owner of such last mentioned premises should be able to recover compensation in respect of such matters as interference with trade, suspension of business, and the like. I see nothing in the Act to preclude the owner of such a building as the one here in dispute from recovering compensation for all the loss and damage which he may have suffered in consequence of the pulling down of his building. Subject to the more or less formal provisions of s. 41, there is, I think, in s. 38 a complete code for fixing the compensation for the removal of an obstructive building which is not a dwelling-house. If, however, the obstructive

(1) See note at end of report.

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building is a dwelling-house there must be read also into s. 38 the special provisions of s. 41 which relate to arbitrations concerning dwelling-houses, but I do not think these special provisions control the meaning of s. 38, and in my opinion the contention of the local authority here is right and the action fails.

I think it desirable to express an opinion on the other point which has been argued at the Bar. It is said that the plaintiffs are estopped by conduct from obtaining the relief they claim. The conduct which has so estopped them is, it is argued, conduct either resulting in a concluded agreement or of such a nature as to induce the defendants to believe that there was a concluded agreement and to act accordingly. I do not think that the mere fact that the plaintiffs did not appeal against the order to pull down would of itself work an estoppel. It is, however, a matter to be taken into consideration in estimating the effect of the plaintiffs' conduct. Nor, I think, would the plaintiffs by standing by and allowing the defendants to proceed, hoping and believing, it may be, that an arrangement could ultimately be come to between them and the defendants, be thereby disqualified from asserting that the whole procedure was ultra vires when they found that no satisfactory arrangement could be come to. But, in my opinion, this is not the attitude which the plaintiffs have adopted. [His Lordship then considered the circumstances, and came to the conclusion that the plaintiffs entered into a bargain with the defendants by which the plaintiffs agreed that, if the defendants would limit the pulling down to a portion of the building and allow part of the yard to be covered in, they would not object to the portion being treated as an obstructive building, and that that bargain precluded the plaintiffs from being heard to say that no part of the building was an obstructive building; moreover, it was only when they thought the compensation offered inadequate that they turned round and alleged that the whole proceedings were ultra vires.] Therefore, even if I had not come to the conclusion that the action fails on other grounds, I should have decided it against the plaintiffs on the point of estoppel.

I dismiss the action with costs, which under the Public

Authorities Protection Act, 1893, will be taxed as between solicitor and client.

Solicitors : *Frank Patteson, for Cutter, Deuchar & Broadsmith, Knutsford ; Davenport, Cunliffe & Blake, for Ashworth & Inman, Manchester.*

NOTE.

HOUSING OF THE WORKING CLASSES ACT, 1890 (53 & 54 Vict. c. 70).

"PART II.

"UNHEALTHY DWELLING HOUSES.

"*Preliminary.*

"29. In this Part of this Act, unless the context otherwise requires—

. . . . . .

"The expression 'dwelling house' means any inhabited building, and includes any yard, garden, outhouses, and appurtenances belonging thereto or usually enjoyed therewith, and includes the site of the dwelling house as so defined."

(*N.B.*—By s. 49 of the Housing, Town Planning, &c., Act, 1909 (9 Edw. 7, c. 44), the words "means any inhabited building, and" are to be omitted.)

"*Obstructive Buildings.*

"38.—(1.) If a medical officer of health finds that any building within his district, although not in itself unfit for human habitation, is so situate that by reason of its proximity to or contact with any other buildings it causes one of the following effects, that is to say,—

"(*a.*) It stops ventilation, or otherwise makes or conduces to make such other buildings to be in a condition unfit for human habitation or dangerous or injurious to health; or

"(*b.*) It prevents proper measures from being carried into effect for remedying any nuisance injurious to health or other evils complained of in respect of such other buildings;

in any such case, the medical officer of health shall represent to the local authority the particulars relating to such first-mentioned building (in this Act referred to as 'an obstructive building') stating that in his opinion it is expedient that the obstructive building should be pulled down.

. . . . . .

"(3.) The local authority on receiving any such representation as above in this section mentioned shall cause a report to be made to them . . . . , and . . . . shall take into consideration the representation and report, and if they decide to proceed, shall cause a copy of both the representation and report to be given to the owner of the lands upon which the obstructive building stands . . . .; and such owner shall be at liberty to . . . . state his objections, and after hearing such objections the local authority shall make an order either allowing the objection or directing that such obstructive building shall be pulled down, and such order shall be subject to appeal

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in like manner as an order of demolition of the local authority under the foregoing provisions of this part of this Act.

"(4.) Where an order of the local authority for pulling down an obstructive building is made under this section and either no appeal is made against the order, or an appeal is made and either fails or is abandoned, the local authority shall be authorised to purchase the lands on which the obstructive building is erected in like manner as if they had been authorised by a special Act to purchase the same; and for the purpose of such purchase the provisions of the Lands Clauses Acts, with respect to the purchase and taking of lands otherwise than by agreement shall be deemed to be incorporated in this part of this Act (subject nevertheless to the provisions of this part of this Act), and for the purpose of the provisions of the Lands Clauses Acts this part of this Act shall be deemed to be the special Act, and the local authority to be the promoters of the undertaking . . . .

"(5.) The owner of the lands may within one month after notice to purchase the same is served upon him declare that he desires to retain the site of the obstructive building and undertake either to pull down or to permit the local authority to pull down the obstructive building, and in such case the owner shall retain the site and shall receive compensation from the local authority for the pulling down of the obstructive building.

"(6.) The amount of such compensation, and also the amount of any compensation to be paid on the purchase of any lands under this section, shall in case of difference be settled by arbitration in manner provided in this part of this Act.

"(7.) Where the local authority is empowered to purchase land compulsorily, it shall not be competent for the owner of a house or manufactory to insist on his entire holding being taken, where part only is proposed to be taken as obstructive, and where such part proposed to be taken can, in the opinion of the arbitrator to whom the question of disputed compensation is submitted, be severed from the remainder of the house or manufactory without material detriment thereto, provided that compensation may be awarded in respect of the severance of the part so proposed to be taken in addition to the value of that part.

. . . . . ."

(*N.B.*—By s. 46 and Sched. II. of the Housing, Town Planning, &c., Act, 1909, the words "house or other building or manufactory" are substituted for the words "house or manufactory" in sub-s. 7.)

"*Scheme for Reconstruction.*

"39.—(1.) In any of the following cases, that is to say—

"(*a.*) where an order for the demolition of a building has been made in pursuance of this part of this Act, and it appears to the local authority that it would be beneficial to the health of the inhabitants of the neighbouring dwelling-houses if the area of the dwelling-house of which such building forms part were used for all or any of the following purposes, that is to say, either—

(i) dedicated as a highway or open space, or

(ii) appropriated, sold, or let for the erection of dwellings for the working classes, or

(iii) exchanged with other neighbouring land which is more suitable for the erection of such dwellings, and on exchange will be appropriated, sold, or let for such erection; or

"(*b.*) where it appears to the local authority that the closeness, narrowness, and bad arrangement or bad condition of any buildings, or the want of light, air, ventilation, or proper conveniences, or any other sanitary defect in any buildings is dangerous or prejudicial to the health of the inhabitants either of the said buildings or of the neighbouring buildings, and that the demolition or the reconstruction and re-arrangement of the said buildings or of some of them is necessary to remedy the said evils, and that the area comprising those buildings and the yards, outhouses, and appurtenances thereof, and the site thereof, is too small to be dealt with as an unhealthy area under Part I. of this Act,

the local authority shall pass a resolution to the above effect and direct a scheme to be prepared for the improvement of the said area.

"(2.) Notice of the scheme may . . . . be served . . . . on every owner or reputed owner, lessee or reputed lessee, and occupier of any part of the area comprised in the scheme . . . .

"(3.) The local authority shall, after service of such notice, petition the Local Government Board for an order sanctioning the scheme, and the Board may cause a local enquiry to be held, and, if satisfied . . . . that the carrying into effect of the scheme . . . . would be beneficial to the health of the inhabitants of the said buildings or of the neighbouring dwelling-houses, may by order sanction the scheme . . . .

"(4.) Upon such order being made, the local authority may purchase by agreement the area comprised in the scheme . . . . , and if they agree for the purchase of the whole area, the order . . . . shall take effect without confirmation. If they do not so agree, the order shall be published . . . .

"(5.) Any owner may . . . . petition the Local Government Board against the order . . . .

"(6.) If the Local Government Board are satisfied that the order has been duly published, and that two months after such publication have expired, and that either a petition has not been presented, or if presented has been withdrawn, they shall confirm the order . . . .

"(7.) The order may incorporate the provisions of the Lands Clauses Acts, and for the purpose of those provisions this Act shall be deemed to be the special Act, and the local authority to be the promoters of the undertaking, ...: Provided that the amount of compensation shall, in case of difference, be settled by arbitration in manner provided by this part of this Act.

. . . . . .

"*Settlement of Compensation.*

"41. In all cases in which the amount of any compensation is, in pursuance of this part of this Act, to be settled by arbitration, the following provisions shall have effect; (namely,)

"(1.) The amount of compensation shall be settled by an arbitrator to be appointed and removable by the Local Government Board.

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"(2.) In settling the amount of any compensation—

"(*a.*) The estimate of the value of the dwelling-house shall be based on the fair market value as estimated at the time of the valuation being made of such dwelling-house, and of the several interests in such dwelling-house . . . . without any additional allowance in respect of compulsory purchase; and

"(*b.*) The arbitrator shall have regard to and make an allowance in respect of any increased value which, in his opinion, will be given to other dwelling-houses of the same owner by the alteration or demolition by the local authority of any buildings.

"(3.) Evidence shall be receivable by the arbitrator to prove—

"(1st) that the rental of the dwelling-house was enhanced by reason of the same being used for illegal purposes or being so overcrowded as to be dangerous or injurious to the health of the inmates; or

"(2ndly) that the dwelling-house is in a state of defective sanitation, or is not in reasonably good repair; or

"(3rdly) that the dwelling-house is unfit, and not reasonably capable of being made fit, for human habitation;

and, if the arbitrator is satisfied by such evidence, then the compensation—

"(*a.*) shall in the first case so far as it is based on rental be based on the rental which would have been obtainable if the dwelling-house was occupied for legal purposes and only by the number of persons whom the dwelling-house was under all the circumstances of the case fitted to accommodate without such overcrowding as is dangerous or injurious to the health of the inmates; and

"(*b.*) shall in the second case be the amount estimated as the value of the dwelling-house if it had been put into a sanitary condition, or into reasonably good repair, after deducting the estimated expense of putting it into such condition or repair; and

"(*c*) shall in the third case be the value of the land, and of the materials of the buildings thereon.

. . . . . .

"(5.) Sections thirty-two, thirty-three, thirty-five, thirty-six, and thirty-seven of the Lands Clauses Consolidation Act, 1845, shall apply, with any necessary modifications, to an arbitration and to an arbitrator appointed under this part of this Act.

. . . . . ."

A. L.

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July 28, 29.

[1879 L. 24.]

Practice—Fund in Court—Payment to One Trustee.

The rule that a trust fund in Court will not be ordered to be paid out to a sole trustee except on the consent of all parties beneficially interested is not an inflexible rule; under special circumstances payment to a sole trustee will be ordered.

A lady, on her marriage in 1890, settled a fund of her own to be held by G., her brother, in trust for herself for life, then for U., her husband, for his life, and on the death of the survivor upon trust for the children of the marriage, and in default of children in trust for the settlor absolutely. G. was empowered, while sole trustee, to invest the fund as he thought fit, but if he ceased to be sole trustee, the fund was to be invested on trust securities. U. deserted the settlor in 1890, and they had not since come together. There were no children of the marriage. The fund being in Court, G. and the settlor petitioned for payment out to G. as sole trustee. U. was not a party to the proceedings. G. undertook that if a child of the marriage was born he would have a second trustee appointed:—

Held, that in these special circumstances the fund must be ordered to be paid out to G., the sole trustee.

Alice Haydon Gardner, spinster, on August 6, 1890, was married to Frederick William Upton, and by the settlement made on their marriage, dated July 31, 1890, and made between the intended husband of the first part, the intended wife of the second part, and Frederick Leigh Gardner (the sole trustee) of the third part, in consideration of the intended marriage the intended wife assigned to F. L. Gardner all her share and interest under a certain recited will and settlement, upon trust that he should require the transfer or payment to him when and so soon as the same should fall into possession and to pay the income thereof to the wife for life, for her separate use, without power of anticipation, and after her death to pay the income to the husband, if he survived, during his life, and after the death of the survivor in trust for the children or child of the marriage, and if there should be no child, in trust for the wife absolutely if she should survive the coverture, but, if she should not survive it, upon such trusts as she should by will appoint, and subject thereto in trust for the persons who under the statutes of distribution would on her

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decease have been entitled thereto if she had died intestate and without having been married. The settlement continued as follows: "And it is hereby declared that all moneys liable to be invested under these presents may, during such time as the said Frederick Leigh Gardner is sole trustee hereof, be invested or lent in and on such investments, securities, bonds, debentures, stocks, or shares, freehold or leasehold property, or personal security as the said Frederick Leigh Gardner shall in his own absolute uncontrolled discretion think fit and proper, as if such trust estate were the absolute property of the said Frederick Leigh Gardner, and without him being liable for any loss that may arise from any insufficient security or securities, and although such investments may be of a wasting or speculative character, with power for the said Frederick Leigh Gardner to vary such investments from time to time. And, when and if the said Frederick Leigh Gardner shall cease to act as sole trustee hereunder, all moneys liable to be invested under these presents shall be invested in such securities as are for the time being permitted by law as investments of trust funds." The settlement did not contain any power to appoint a new trustee.

Upton deserted his wife in 1892, and since then they had not come together again. There had been no child of the marriage, and Mrs. Upton was forty-nine years old. The settled fund was represented by one half of certain Consols in Court in the present action, and F. L. Gardner (still sole trustee under the settlement) and Mrs. Upton presented a petition praying that the Consols might be sold and that after payment of costs and duties one half of the residue might be paid out to F. L. Gardner as trustee of the settlement.

Upton's address was unknown, and no person was made respondent to the petition.

When the petition first came on for hearing Sargant J. adjourned it for the purpose of authorities being examined as to ordering payment out to a sole trustee.

G. M. Simmonds, for the petitioners. In Daniell's Chancery Practice, 8th ed. p. 1542, it is stated that "a trust fund will not be ordered to be paid out to a sole trustee, except on the consent

of all parties beneficially interested," and in support of this proposition the following authorities are cited: *In re Roberts* (1); *Grant* v. *Grant* (2); *Gouldsmith* v. *Luntley.* (3) In Seton on Judgments, 7th ed. p. 1165, it is stated that "payment out is not made to a single trustee, unless all interested are present; but may be made to three out of four, the other being abroad"; and the authorities cited are *In re Roberts* (1) and *Clark* v. *Fenwick.* (4)

In Lewin on Trusts, 12th ed. p. 413, it is stated that "the Court will not, in the exercise of its discretion, except under special circumstances, pay out money to a single trustee who has survived his co-trustees," and the case referred to as to special circumstances is *In re Courts of Justice Concentration (Site) Act,* 1865. (5) There the money in Court was immediately divisible among five persons, all sui juris, one of whom was in Australia, and the Court allowed the money to be paid to a single trustee with the consent of the four beneficiaries who were in England.

The case of a sole trustee being originally appointed is stronger in favour of payment out to him than the case of a surviving trustee when more than one is originally appointed. In the case of a lunatic sole trustee one trustee was appointed in his place: *In re Reynault.* (6)

[SARGANT J. Apparently, there were there no funds in Court.]

In *In re Roberts* (1) the trustee to whom payment was ordered to be made was one of several original devisees in trust. In *Grant* v. *Grant* (2) the proposition, that the Court never trusts to a single trustee, is too widely stated. *Baillie* v. *M'Kewan* (7)—in which Lord Romilly M.R. said there had been negligence "on the part of the plaintiffs in allowing all the property settled on their marriage to be transferred into the name of a single trustee, which, however respectable he may be, ought never to be permitted"—was not a case of money in Court. In *Gouldsmith* v. *Luntley* (3) the beneficiaries were not all before the Court. The rule laid down in the text-books seems to be not inexorable, and

(1) (1861) 9 W. R. 758.
(2) (1865) 6 N. R. 347.
(3) (1875) 32 L. T. 535.
(4) [1873] W. N. 38; 42 L. J. (Ch.) 320.
(5) [1867] W. N. 148.
(6) (1852) 16 Jur. 233.
(7) (1865) 35 Beav. 177, 183.

SARGANT J. sufficient special circumstances exist here to justify an order for payment out to one trustee. The trustee will undertake that if any children are born he will obtain the appointment of another trustee. [He also referred to *In re Dickinson's Trusts* (1); *In re Dickson's Estate* (2); *Consterdine* v. *Consterdine* (3); *In re Tunstall's Will.* (4)]

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SARGANT J. This petition stood over on one point only. The question was whether the Court could or would direct payment out of money in Court to one trustee without the consent of all the beneficiaries entitled to the fund. During the adjournment Mr. Simmonds has carefully looked up the authorities, and they shew, in my opinion, that the rule laid down in some of the text-books is not inflexible. In the present case a lady, on her marriage in 1890, settled a fund belonging to herself in trust for herself for life, then for her husband if he survived her, and, after the death of both of them, for the children of the marriage, and if there should be no child, for the lady absolutely. There was only one trustee, Mr. Gardner, who was the settlor's brother, and while he was sole trustee he had absolute power as to how the trust fund was to be invested. When he ceased to be sole trustee the trust funds were to be invested in such securities as were for the time being permitted by law as investments of trust funds. The husband deserted the settlor in 1892, and so far they have not come together again. The husband is not a respondent to the petition, but the settlor and the trustee now petition for payment out to the sole trustee. He undertakes that if the order is made and any child of the marriage is born, he will obtain the appointment of another trustee. In these circumstances I think I may direct payment out to one trustee.

Solicitors: *Bullock & Co.*

(1) (1855) 1 Jur. (N.S.) 724.
(2) (1869) I. R. 3 Eq. 344.
(3) (1862) 31 Beav. 330, 334.
(4) (1851) 4 De G. & Sm. 421.

F. E.

Distinguished. *Re* GREENWOOD'S AGREEMENT. [1949] 2 All E.R. 743.

Distinguished. *In re* GREENWOOD'S AGREEMENT [1950] 1 Ch. 33

WYNN *v.* CONWAY CORPORATION.

[1913 W. 680.]

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JOYCE J.
March 11, 20.
C. A.
July 16, 17.

Landlord and Tenant—Lease—Covenant for Perpetual Renewal—Principle of Construction—Presumption.

Covenant in a lease for twenty-one years that the lessors will "at the expiration of the first eleven years of the term hereby granted in case the lessee shall surrender or resign these presents and the term of twenty-one years hereby granted to the lessors and upon such surrender as aforesaid and paying to the lessors at the expiration of eleven years aforesaid or upon the 29th day of September next after the determination of the said eleven years the sum of 7*l.* 10*s.* for a fine for the said premises then the lessors shall and will at the proper costs and charges of the lessee grant unto the lessee a new lease of the premises hereby demised with the appurtenances for the term of twenty-one years to commence from the expiration of the said eleven years at with and under the like rents covenants and agreements as are in these presents mentioned expressed or contained and so often as every eleven years of the said term shall expire will grant and demise unto the lessee such new lease of the said premises upon surrender of the old lease as aforesaid and paying such fine of 7*l.* 10*s.* on the day or time hereinbefore limited or appointed":—

Held by the Court of Appeal, affirming the decision of Joyce J., that upon the true construction of the covenant the lessee was entitled to a perpetual right of renewal at the end of every successive period of eleven years.

ACTION.

By a lease of August 5, 1901, for twenty-one years from September 29, 1901, the defendant corporation covenanted with the plaintiff, the lessee, "that they the lessors will at the expiration of the first eleven years of the term hereby granted in case the lessee shall surrender or resign these presents and the term of twenty-one years hereby granted to the lessors and upon such surrender as aforesaid and paying to the lessors at the expiration of eleven years aforesaid or upon the 29th day of September next after the determination of the said eleven years the sum of 7*l.* 10*s.* for a fine for the said premises then the lessors shall and will at the proper costs and charges of the lessee grant unto the lessee a new lease of the premises hereby demised with the appurtenances for the

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term of twenty-one years to commence from the expiration of the said eleven years at with and under the like rents covenants and agreements as are in these presents mentioned expressed or contained and so often as every eleven years of the said term shall expire the lessors will grant and demise unto the lessee such new lease of the said premises upon surrender of the old lease as aforesaid and paying such fine of 7*l.* 10*s.* on the day or time hereinbefore limited or appointed."

The plaintiff or his predecessors in title had been lessee or lessees of the corporation for a period of ninety years past under a series of leases for twenty-one years, each lease being in the same form and containing such a covenant as the one set out above, in the same terms, at a rent of 8*s.* per annum, and such leases had been regularly renewed at the end of the first eleven years of the term on payment of the fine of 7*l.* 10*s.*

On the expiration of the first eleven years of the lease of August 5, 1901, i.e., September 29, 1912, the corporation were unwilling to grant to the lessee a renewed lease on the old terms.

The lessee thereupon brought this action for specific performance of the covenant.

The action was heard before Joyce J. on March 11, 1914.

Macmorran, K.C., and *J. Tanner*, for the plaintiff. Upon the construction of this covenant the lessee is entitled to a perpetual right of renewal of the lease upon the expiration of the first eleven years of each term of twenty-one years. The defendants being bound by the covenants of the lease in existence in 1835 are empowered by virtue of the Act 5 & 6 Will. 4, c. 76, ss. 94 and 95, and the Municipal Corporations Act, 1882, s. 108, sub-s. 2, and s. 110, to grant a renewal.

[They were stopped.]

Hughes, K.C., and *J. M. Gover*, for the defendants. The plaintiff has no right to a perpetual renewal of the lease. It is well settled that a covenant to renew with like rents, covenants, and agreements does not give a right to have a covenant to renew. It gives a right to one renewal only. The utmost the plaintiff is entitled to is a new lease for twenty-one years from September 29, 1912, with a covenant for renewal at the end of the first eleven

years, i.e., on September 29, 1923, which would give him the right to a new lease for twenty-one years from that date, but without any further covenant for renewal.

The principle upon which such covenants should be construed may be gathered from *Baynham* v. *Guy's Hospital* (1), *Moore* v. *Foley* (2), *Brown* v. *Tighe* (3), *Sadlier* v. *Biggs* (4), and *Swinburne* v. *Milburn.* (5) Those cases shew that there is a presumption against so construing such a covenant as to give a right of perpetual renewal. The words "every eleven years of the said term" must be construed as referring only to the first eleven years of the original term. So construed they do not give any right of perpetual renewal. "The said term" cannot be read as "every term whether original or future." See also *Atkinson* v. *Pillsworth* (6); *Palmer* v. *Hamilton* (7); *Sheppard* v. *Doolan* (8); *Chambers* v. *Gaussen.* (9)

Macmorran, K.C., in reply. Here the words cannot be read strictly or unequivocally. But the meaning is clear. The covenant contemplates that there will always be an existing term under which the premises will be held. It has been treated for many years past as conferring a right of perpetual renewal, for there has been a series of leases in precisely similar terms. This shews that the construction for which the plaintiff contends is not an impossible one. Even had it been treated otherwise by the parties, the interpretation of what is a clear document would not have been affected: *Hare* v. *Burges* (10); *North Eastern Ry. Co.* v. *Lord Hastings.* (11)

Cur. adv. vult.

March 20. JOYCE J. In this case the question is the true construction of a covenant for renewal in a lease from the defendant corporation to the plaintiff for a term of twenty-one years from Michaelmas, 1901. The plaintiff or his predecessors in title have been lessees of the corporation for a great number of years under

(1) (1796) 3 Ves. 295.
(2) (1801) 6 Ves. 232.
(3) (1834) 2 Cl. & F. 396, 405, n.
(4) (1853) 4 H. L. C. 435.
(5) (1884) 9 App. Cas. 844.
(6) (1787) 1 Ridg. 449; Vern. & Scriv. 157.
(7) (1793) 2 Ridg. 535, 550.
(8) (1842) 3 D. & War. 1.
(9) (1844) 2 J. & Lat. 99.
(10) (1857) 4 K. & J. 45.
(11) [1900] A. C. 260.

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a series of leases for twenty-one years, each lease being in the same form, and containing such a covenant as is now in question in the same terms at a rent of 8*s.* per annum, and such leases have been regularly renewed at the end of the first eleven years of the term upon payment of a fine of 7*l.* 10*s.* The later leases from 1824 (an important date, because prior to any of the Municipal Corporation Acts) are produced. The subsisting lease is dated in August, 1901, and is for twenty-one years from September 29 of that year, so the first eleven years of the term expired on September 29, 1912, whereupon the present dispute arose.

The covenant for renewal is in these terms: [His Lordship read the covenant down to the words "as are in these presents mentioned expressed or contained."] Pausing here, it must be admitted that the covenant so far, having regard to well-known authorities, would not have the effect of conferring a perpetual right of renewal. If the portion I have read had been followed by the words "including this present covenant," or by other words plainly indicating that the right of renewal was to be perpetual, then the result would have been different. In *Hare* v. *Burges* (1) Lord Hatherley, then Sir W. Page Wood, V.-C., expressed his opinion as to the principle upon which such covenants as the one I have to consider ought to be construed. He says (2): "As regards the first and main question, I must hold that the covenant in the original lease is in effect a covenant for perpetual renewal. Mr. Batten argued, that this question must never depend upon mere inference; that, in the absence of words indisputably pointing to a perpetual renewal,—words so strong that it is impossible to adopt any other construction,—the Court, although it may find in the instrument words apparently pointing to perpetual renewal, will not adopt that construction, if any other can by possibility be put upon the terms of the covenant." That was the argument. "To that view I cannot accede. It seems to me, that the true rule of construction in a case like this, is that referred to by Turner L.J. as Vice-Chancellor in *Rochford* v. *Hackman* (3),

(1) 4 K. & J. 45. (2) 4 K. & J. 53.
(3) (1852) 9 Hare, 475, 483.

where he says that some effect must if possible be given to all the words of an instrument; and if the Court sees no effect which can be given to certain words, unless they be construed in a particular manner, then, whatever mere presumption may stand in the way, it will construe them in that manner. The Court is not at liberty to do violence to the words of the instrument, in order to carry into effect what is merely a presumption. So, in a case like the present, giving full weight to the argument that there is a presumption against construing a covenant so as to amount to a covenant for perpetual renewal,—that prima facie a lessor shall not be taken to have intended to enter into such a covenant, still there may be in the instrument expressions indicative of such an intention; and, if there be, the Court will not force the construction, but will give effect to what appears to have been the lessor's intention." Earl Selborne, always a very safe guide, says in *Swinburne* v. *Milburn* (1): "I am not inclined to adopt the language which is to be found in some authorities, to the effect that there is a sort of legal presumption against a right of perpetual renewal in cases of this kind; but those authorities certainly do impose upon any one claiming such a right the burden of strict proof, and are strongly against inferring it from any equivocal expressions which may fairly be capable of being otherwise interpreted."

In the present case the covenant in question after the portion I have read proceeds in quite general terms, "and so often as every eleven years"—the words "so often as" and "every" involving in themselves the idea of recurrence or repetition—"of the said term shall expire the lessors will grant and demise"—a rather odd word—"unto the lessee such new lease of the said premises upon surrender of the old lease as aforesaid." Perhaps it is not quite clear whether the words "as aforesaid" refer to the surrender, or qualify or describe such new lease so that the meaning would be "such new lease as aforesaid upon surrender of the old lease." I think the term "the old lease" means the old or the subsisting lease for the time being, and it appears to me that the phrase "the said term," if "said" really means anything where it occurs in collocation with the

(1) 9 App. Cas. 844, 850.

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words " so often as every eleven years " &c., means simply the term of twenty-one years or the term granted or the then subsisting term. " Every eleven years of the said term " must mean every first eleven years of the term. There are not two or three periods of eleven years in any one term of twenty-one years ; or, in other words, it comes to this, that the meaning is " so often as every successive period of eleven years shall expire." I take the fair and proper meaning of the words used, having due regard to the context, to be that, so often as every first eleven years of the term of twenty-one years—that is, the subsisting term of twenty-one years or the term of twenty-one years last granted —shall expire, the lessors will grant a similar new lease upon the surrender of the old lease, and so on toties quoties. If the words I have been discussing, which must have some meaning, do not mean what I have indicated as my view, I am unable to see what rational meaning is to be given to them. The defendants struggle to escape from the conclusion I have arrived at by insisting that the phrase " the said term " means, and can only mean, the particular new term of twenty-one years from September 29, 1912, for the granting of which term the earlier part of the covenant provides, and that these words " so often " &c. operate on one single occasion only, that is, at the expiration of the first eleven years from 1912, or, in other words, in 1923, and at no other time. I am perfectly certain that this was not in fact the intention of the parties, nor can I bring myself to think that it is a fair or proper construction of the words used, having regard to the phrases " so often as," " every eleven years," and " the old lease," &c., &c. If it had been intended by the words I am considering simply to provide for one new lease of twenty-one years from September 29, 1923, and upon no other occasion, that intention would have been easily expressed in very much plainer language, and would have been very differently expressed.

I think I shall be following Wood V.-C. in *Hare* v. *Burges* (1), and not acting at variance with the opinion expressed by Earl Selborne in *Swinburne* v. *Milburn* (2), if I hold, as I do, that the effect of the covenant in the present case is to confer upon the lessee a perpetual right of renewal at the expiration of

(1) 4 K. & J. 45. (2) 9 App. Cas. 844, 850.

every successive period of eleven years (because that is what it comes to) upon payment of the fine of 7*l.* 10*s.*

A. L.

Against this decision the corporation appealed. The appeal came on for hearing on July 16, 1914.

Hughes, *K.C.*, and *J. M. Gover*, for the appellants. In this case there is no right of perpetual renewal. It is said that there is a sort of legal presumption in cases of this kind against such a right, but Earl Selborne in *Swinburne* v. *Milburn* (1) declined to go as far as that. The learned judge in the Court below did not pay sufficient regard to the rule that in order to construe the covenant as one for a perpetual renewal it must be found to be clear, distinct, and unambiguous. It is not so found here. The language is ambiguous and the Court will adopt that construction which does least violence to the words themselves and will not hold that there is a right of perpetual renewal.

Macmorran, *K.C.*, and *J. Tanner*, for the respondent, were not called upon.

July 17. LORD COZENS-HARDY M.R. This is an appeal from a decision of Joyce J., who has held that the plaintiff is entitled to the grant of a lease for twenty-one years, and also to a covenant for perpetual renewal in certain events. I so entirely agree, not merely with Joyce J.'s decision, but with the reasons which he has assigned for it in his careful judgment, that I have some hesitation in saying any more than that I do agree with the decision ; but having regard to the arguments which have been presented before us, it is right that I should, in a very few words, say how the construction strikes me.

Now, this we know, that for ninety years leases have been granted by the corporation to the plaintiff or his predecessors in title upon the same terms, that is to say, a rent of 8*s.* a year with a fine for the premises of 7*l.* 10*s.* every eleven years. I do not use that as enabling us to interpret the construction of the lease, but at least I am entitled to say that it is not altogether an absurd construction if you are inclined, as I am, to the view that that is a covenant for perpetual renewal. The date, of course, is

(1) 9 App. Cas. 844, 850.

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important, because it takes the case out of the operation of the Municipal Corporations Act. The corporation is entitled to do that which it did before the Municipal Corporations Act. The last renewal was on August 5, 1901. It was a lease for twenty-one years from Michaelmas, 1901, at a yearly rent of 8*s*., and subject to the covenants therein contained. The covenant is as follows. [The Master of the Rolls read the covenant and continued:] Now there cannot be two periods of eleven years in the term of twenty-one years, and the argument on behalf of the appellants merely amounts to this, that those words must be disregarded. Counsel for the appellants did not quite assent to the suggestion that his argument involved striking them out, but undoubtedly it is exactly the same : he says you cannot give effect to them because there is a presumption against a right of perpetual renewal. That presumption is obviously one which is capable of being rebutted. I think the language of Wood V.-C. in *Hare* v. *Burges* (1), which was quoted by Joyce J., amounts to this, that in a case like the present, giving full weight to the argument that there is a presumption against construing a covenant so as to amount to a covenant for perpetual renewal—that prima facie a lessor shall not be taken to have intended to enter into such a covenant, still there may be in the instrument expressions indicative of such an intention ; and, if there be, the Court will not force the construction, but will give effect to what appears to have been the lessor's intention. Without going through the minute criticism which Joyce J. did, agreeing entirely with what he said, I think, on the fair construction of this instrument, that it contemplated that once in every eleven years as often as there was a term of twenty-one years in existence there was at the end of the first eleven years of that term a right to the grant of a new lease containing a similar covenant for renewal.

For those reasons I think the decision of the learned judge was quite right, and the appeal must be dismissed with costs.

SWINFEN EADY L.J. I agree. The appellants ask us to construe the words "and so often as every eleven years of the

(1) 4 K. & J. 45.

said term shall expire" as meaning once only, that is to say at the expiration of the first eleven years from 1912, that is to say in 1923—on that occasion and on no other occasion. The learned judge below said he was certain from the language used that that was not in fact the intention of the parties, and I agree with his observation. In my opinion the closely reasoned judgment of Joyce J. is perfectly sound on every point, and I agree with all that he said.

PICKFORD L.J. I am of the same opinion; I do not wish to add anything to Joyce J.'s judgment, because I entirely agree.

Solicitors; *Dunkerton & Son, for Picton-Jones & Roberts, Pwllheli; Jaques & Co., for William Thornton Jones, Bangor.*

G. A. S.

In re RICHARD MURRAY HOSPITAL.

[1914 R. 737.]

Charity — Hospital — "Wholly maintained by voluntary contributions" — Founder's Deed of Gift — One Original Contribution — Power to apply Capital or Income for General Purposes of Charity — Jurisdiction of Charity Commissioners—Exemption—Charitable Trusts Act, 1853 (16 *&* 17 *Vict. c.* 137), *ss.* 9, 10, 62, 66.

A deed of gift of real and personal property to trustees for the purpose of founding a hospital provided for the realization of the property and application of the capital and income of the proceeds for the general purposes of the charity and, in particular, for the erection and equipment of a hospital to the extent of 10,000*l.* Part of the property had been realized and the hospital had been erected and was in the course of being furnished and equipped. A subscription list had not yet been opened, and the charity was being maintained solely by the proceeds of sale and income of the property originally contributed for its foundation. The trustees of the charity claimed exemption from the jurisdiction of the Charity Commissioners on the ground that the hospital was a charity "wholly maintained by voluntary contributions":—

Held, that in the existing circumstances the hospital was not an "institution, establishment, or society for . . . . charitable purposes wholly maintained by voluntary contributions" within the meaning of that expression in s. 62 of the Charitable Trusts Act, 1853, so as to exempt it at present from the jurisdiction or control of the Charity Commissioners or the powers and provisions of the Act.

THIS was a motion by the Charity Commissioners for a writ

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of attachment against John George Murray, Joseph Eltringham, and George Thomas Hyden, the trustees of the above-mentioned charity, for non-compliance with an order of the Commissioners dated November 25, 1913, directing the trustees to deliver or transmit to the Commissioners a full and true statement of the real and personal endowments and property of the charity and full and true accounts of the receipts and expenditure of the charity for the year ending December 31, 1912.

The charity was founded by the late Richard Murray, of Harrogate, by two indentures both dated September 28, 1911, by one of which the founder conveyed certain freehold property to the trustees in fee simple and covenanted to surrender certain copyhold property to them upon trust as to all such property to sell the same and hold the proceeds of sale and the rents and profits until sale upon the trusts and subject to the powers declared and contained by the trust deed of even date, and the trustees were empowered to retain all or any part of the property unsold so long as they should think proper. This deed was duly enrolled pursuant to the Mortmain and Charitable Uses Act, 1888.

The trust deed of even date recited amongst other things the above mentioned indenture and that the founder was minded to found a charity to be known as the Richard Murray Hospital for the charitable purposes therein mentioned and for the purpose of such founding to make such donations as thereinafter appearing to the intent that the same and any other donations or subscriptions that might be given for the purpose might be applied for the general purposes and maintenance of such hospital, and that the founder had paid to the trustees the sum of 10,000*l.* and had transferred to them 10,000*l.* first mortgage debenture stock and 2000 preference shares of 5*l.* each in the North Eastern Breweries, Limited.

By clause 1 of the trust deed it was provided that the trustees should sell the debenture stock and shares and should stand possessed of the said investments until sale, and of the proceeds of sale thereof when sold, and of the said sum of 10,000*l.* and of the proceeds of sale of the real property and of any other money which might from time to time be received by the trustees and

whether arising from subscriptions, donations, bequests, or from any other source, and of any investments for the time being representing the same (thereinafter called the trust fund) and of the rents and profits of the real property until sale, and of any other income derived from the trust fund, upon trust primarily to apply both the capital and income of the trust fund for the general purposes of the charity in such manner as the governing body should from time to time at their meetings direct and in particular for or towards the erection and equipping of such a hospital as aforesaid, but so that there should not be expended out of the trust fund then actually settled for the purpose of such erecting and equipping a larger sum than 10,000*l.*

Clause 2 provided that without prejudice to the primary trust aforesaid the trustees might with the consent of the governing body apply the income alone of the trust fund or any part of such income for the general purposes of the charity, and in particular in payment of all rents, rates, taxes, costs of insurance, repairs, and other outgoings; in making roads, paths, and other improvements; for the maintenance, upkeep, and support of the hospital and in payment of its staff and generally of the expenses in connection therewith, and for such other purposes in connection with the charity as the governing body might from time to time direct.

The founder died on February 27, 1913, having appointed the respondent John George Murray his executor.

Immediately after the date of the conveyance and trust deed the trustees selected a site for the hospital, obtained plans and specifications, and entered into a contract for the erection of the hospital in accordance with the provisions of the trust deed. The hospital had now been erected and was in course of being furnished and equipped; and it was expected that the hospital would be ready for the reception of patients in a few months' time. It was intended to appeal for donations and subscriptions from the residents of the district which the hospital was meant to serve, and from others, but it had not been considered advisable to make any appeal for subscriptions, donations, and collections until the hospital was open for the reception of patients.

The land conveyed to the trustees was in a populous district

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where there was a demand for small sites for artisan dwellings and the trustees were proposing to sell a considerable part of the land in small sites at from 16*l.* to 25*l.* each, and they strongly objected to any intervention on the part of the Charity Commissioners, alleging that the increased costs thereby occasioned would seriously diminish the net proceeds of sale, and that having to obtain the consent of the Commissioners would deter intending purchasers.

In the year 1912 the Commissioners applied to the trustees for the conveyance and trust deed for the purpose of registering them in their records. The trustees sent the deeds, but stipulated that the sending of them was not to be taken as any admission of the jurisdiction of the Commissioners. Subsequently the Commissioners applied for accounts, but the governors of the hospital repudiated their claim, and in consequence the order of November 25, 1913, above referred to was made and these proceedings instituted for the purpose of determining whether the charity was entitled to exemption from the provisions of the Charitable Trusts Acts as alleged on behalf of the hospital.

Sheldon, for the Charity Commissioners. This is clearly a charity established under the two deeds of September 28, 1911. Under ss. 9 and 10 of the Charitable Trusts Act, 1853, the Commissioners have power to inquire into the condition and management of all charities, and to require accounts and statements. If the charity trustees claim to be exempt under s. 62 of the Act, the onus is on them to establish exemption.

Hughes, *K.C.*, and *J. M. Baily*, for the respondent trustees. The desire and manifest object of the donor were to avoid coming under the jurisdiction of the Charity Commissioners, and the two deeds of September 28, 1911, were drawn so as to effect that result. The trustees object to the restrictions on sale imposed by the Act and to the increase of expenditure occasioned by obtaining the consent of the Charity Commissioners.

If this is a charity coming within the general scope of s. 62, then the property of the charity is property of a kind exempted by the section inasmuch as it is property " of which no special application or appropriation shall be directed or declared by the

donor" : *Attorney-General* v. *Foundling Hospital* (1) ; *In re Church Army.* (2)

It is not expected that the income from this property will be sufficient to maintain the hospital, which has not yet started its operations, but when it has a subscription list will be opened. At present the hospital is not what is called a "mixed charity," but is a charity "wholly maintained by voluntary contributions" in the sense that its property is applicable either as capital or income under the affirmative power contained in the trust deed enabling the whole of its property to be applied for the general purposes of the charity: *In re Church Army.* (2) No doubt this property comes within the definition of endowment in s. 66, but the full meaning of that definition cannot be sensibly applied to much of s. 62.

This is not such a case as was mentioned by Davey L.J. in his judgment in *In re Clergy Orphan Corporation* (3), but is a case where all the property of the charity is a voluntary contribution given for the general purposes of the charity. The phrase "wholly maintained by voluntary contributions" must be read as including voluntary contributions which may be lawfully applied for the general purposes of the charity and as covering such a charity as the present. The principle of *In re Clergy Orphan Corporation* (3) applies to this case, which is distinguishable from *Attorney-General* v. *Mathieson* (4), where there was a specific appropriation.

Sheldon, for the Charity Commissioners. Each individual sale is not brought before the Commissioners, but in the first instance they have the whole matter before them, and if they approve it the subsequent sales go through without further trouble or any increase of expense.

This property constitutes an "endowment" within the definition in s. 66, and so long as the power of postponement is exercised it remains an endowment. On the face of the two deeds this is an endowed charity, and is maintained by the income of endowment and is not a charity "wholly maintained by voluntary

(1) Ante, p. 154.
(2) (1906) 94 L. T. 559 ; 75 L. J. (Ch.) 467.
(3) [1894] 3 Ch. 145, 154.
(4) [1907] 2 Ch. 383.

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contributions." It has been founded and endowed by one contribution which constitutes an endowment and is subject to the jurisdiction of the Charity Commissioners: *In re Gilchrist Educational Trust* (1), in which case the whole estate could be applied for the purposes of the charity. A charity cannot be maintained wholly by voluntary contributions if it has freehold land used for the purposes of the charity: *Attorney-General* v. *Mathieson*. (2) At the present moment this is a charity which is not exempt under s. 62: *In re Clergy Orphan Corporation* (3); *In re Stockport Ragged, Industrial, and Reformatory Schools* (4); *In re Sir Robert Peel's School at Tamworth* (5); and the order of the Commissioners ought to be obeyed.

Hughes, K.C., in reply.

JOYCE J. I have been much interested in the argument which has been addressed to me, because it seemed to me from the first, as soon as I knew what the facts were, that this is an absolutely plain case, although, as I have often said, one's opinion when most confident about a thing often turns out to be entirely wrong.

Now this matter really lies in a nutshell. There is no doubt that the hospital is a charity within the meaning of that term as defined in s. 66. Further than that, if it be material, it is, in my opinion, an endowed charity in the technical sense for the purposes of this Act, and I am not sure it is not also an endowed charity in the popular sense. That being so, it is within, and liable under, the provisions of s. 9, unless there is to be found in the Act an express exception or exemption applicable to the case. To find an exemption we have to look at s. 62, for that is the only place where you can find an exemption. It is admitted that this charity is not at present being supported partly by voluntary subscriptions and partly by income arising from any endowment. It is not so supported at present whatever it may be in the future, even in the near future, and the only exception or ground of exception or exemption

(1) [1895] 1 Ch. 367.
(2) [1907] 2 Ch. 383.
(3) [1894] 3 Ch. 145.
(4) [1898] 2 Ch. 687.
(5) (1868) L. R. 3 Ch. 543.

relied upon rightly enough by Mr. Hughes is that this charity is exempt under the words which exempt "any institution, establishment, or society for religious or charitable purposes wholly maintained by voluntary contributions."

Now I am not going to define or attempt to define what is meant by "wholly maintained by voluntary contributions." If I did attempt to specify all the cases in which a charity may be properly said to be wholly maintained by voluntary contributions, I have no doubt I should omit some, and so I will not attempt to do it. But still it may be easy to say whether or not this charity is within the class of institutions which are wholly maintained by voluntary contributions, and that is the only question in this case.

This charity derives its support—is supported if you can so call it—from the donation or gift which effected the foundation of the charity, and which must have been voluntary because it was a gift by a living person. No charity can very well be founded without in some way or other being the subject of a voluntary donation or gift. This charity derives its support entirely from the property which it got from the original donation that effected the foundation of the charity. I have not the slightest doubt that the fact of the charity deriving its support from such a foundation does not constitute it a charity which is "wholly maintained by voluntary contributions," or rather, I should say, does not constitute it such an "institution, establishment, or society wholly maintained by voluntary contributions" as is referred to in the 62nd section. In my opinion the contributions there referred to are quite different from this one single contribution which founded the charity, and as Davey L.J. pointed out in *In re Clergy Orphan Corporation* (1), if the construction were that for which Mr. Hughes contends, why then no charity would be liable, and all charities would be exempt if you pursued the thing to its logical conclusion. Therefore I say, notwithstanding that the trustees of this charity were not bound to invest or preserve what was given them, but might spend it all in any way they pleased for the purposes of the charity, that this charity is not an "institution, establishment,

(1) [1894] 3 Ch. 145, 154.

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or society wholly maintained by voluntary contributions" within the meaning of that expression in the 62nd section of the Act of Parliament, and that disposes of the whole case.

Solicitors: *Treasury Solicitor; Crossman, Prichard, Crossman & Block, for Murray & Richmond, Newcastle-on-Tyne.*

R. M.

JOYCE J. 1914 *July* 21, 29.

In re MARY CAROLINE, DOWAGER DUCHESS OF SUTHERLAND.

MICHELL *v.* COUNTESS BUBNA.

[1914 S. 1462.]

Right of Retainer—Covenant to pay Sum to Trustees of Marriage Settlement—Statute-barred Debt—Cestui que Trust of Debt one of several Legal Personal Representatives of Covenantor—Claim of Trustees of Settlement.

By his marriage settlement a husband covenanted to pay a sum of 3000*l.* to the trustees to be held upon the trusts of the funds thereby settled. There was only one child of the marriage, a daughter, who under the trusts of the settlement became absolutely entitled on her mother's death to the settled funds. By his will the husband appointed his wife his sole executrix and residuary legatee and directed payment of the 3000*l.* to the trustees. He died in 1883 and his widow proved his will, but the 3000*l.* was never paid. By her will the widow appointed her daughter and three other persons her executors and bequeathed to her daughter a legacy of 50,000*l.* and a life interest in her residuary estate. The widow died in 1912, and the daughter, as one of her legal personal representatives and as being beneficially entitled to the 3000*l.*, claimed a right to retain the same out of her mother's assets. It was admitted that so far as the trustees of the settlement were concerned the debt under the covenant was barred:—

Held, that the inability of an executor to sue himself, which was the foundation of the right of retainer, did not exist in the present case inasmuch as the debt was due, if at all, to the marriage settlement trustees and not to the daughter, whose only right, if any, was to sue the trustees, and that the daughter was not entitled to retain the 3000*l.*

Cockroft v. *Black* (1725) 2 P. Wms. 298 distinguished.

ADJOURNED SUMMONS.

Under the settlement made upon the marriage in 1872 of the above-named Mary Caroline, Duchess of Sutherland, with her first husband, Arthur Kindersley Blair, the trust funds therein

comprised and vested in the trustees became upon his death subject to a trust for the Duchess for her life with an ultimate trust after her death for the only child of the marriage, the defendant Irene Mary, Countess Bubna absolutely. The settlement contained a covenant by A. K. Blair that he would either in his lifetime, or his heirs, executors, or administrators would within twelve months after his decease, transfer to the trustees a further sum of 3000*l.*, which was to be held upon the trusts hereinbefore declared concerning the funds actually settled.

A. K. Blair died on October 4, 1883, having by his will appointed the Duchess sole executrix and directed that in accordance with the covenant entered into by him in the settlement the sum of 3000*l.* should be realized out of his estate and paid within six calendar months after his death to the trustees of the settlement, and he gave all the rest and remainder of his property to the Duchess. The 3000*l.* was never paid to the settlement trustees.

In 1889 the Duchess intermarried with George Granville, third Duke of Sutherland, who died in 1892.

In 1908 the survivor of the original trustees of the settlement retired from the trusts and the plaintiffs were appointed trustees of the settlement, but the existence of the covenant and the non-performance thereof were not brought to their notice. The deed of appointment contained no vesting declaration or assignment of choses in action.

The Duchess died on May 25, 1912, having appointed the plaintiffs, the Countess and the defendant T. E. Boscawen executors and trustees of her will, by all of whom her will was proved. The Duchess bequeathed a legacy of 50,000*l.* to the Countess and gave her residuary trust estate upon trust for the Countess for life and after her death upon trust for the children and issue of the Countess as therein mentioned.

The plaintiffs took out this summons for the determination (inter alia) of the questions: (1.) Whether the liability of the Duchess as sole legatee and executrix of the covenantor to pay to the plaintiffs the 3000*l.* covenanted by him to be paid had been satisfied by the bequests in her will in favour of the Countess, and (2.) if the liability had not been so satisfied,

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whether the plaintiffs were entitled to retain the 3000*l.* out of the estate of the Duchess.

At the hearing it was admitted that the right of action of the trustees on the covenant was barred, and as it appeared that the trustees were unwilling to retain the 3000*l.* unless ordered to do so, the main contention turned upon the question whether the Countess herself was entitled to retain the 3000*l.*

Hughes, *K.C.*, and *W. A. Jolly*, for the plaintiffs.

Ward Coldridge, *K.C.*, and *H. M. Woodhouse*, for the defendant Countess. The debt of 3000*l.* under the husband's covenant is not barred. By his will he directed his executrix to realize the amount and hold it on trust for the trustees of the marriage settlement.

[JOYCE J. No; the direction was to pay the money to the trustees and that would not prevent the debt from becoming barred.]

Then our contention is that this defendant has a right of retainer in respect of the sum of 3000*l.*, which is a debt owing to the settlement trustees by the Duchess as legal personal representative of her husband, and notwithstanding that it may be barred, the defendant Countess as personal representative of the Duchess may pay the debt and take it under the trusts of the settlement for her own absolute use and benefit. If the debt had been owing to herself, the Countess, although only one out of several personal representatives, could have retained it: *Stahlschmidt* v. *Lett* (1); *Sharman* v. *Rudd* (2); Williams on Executors, 10th ed. p. 797; and inasmuch as she is a beneficiary absolutely entitled under the settlement she can pay herself notwithstanding that in form the debt may be owing to the trustees: *Cockroft* v. *Black* (3); *In re Dunning.* (4)

Moreover, the debt is due from the Duchess as executrix who received assets largely in excess of the debt and held them subject to an express direction to pay the 3000*l.*

Mossop, for the defendant Boscawen. This defendant is the only party not interested either as trustee of the settlement or

(1) (1853) 1 Sm. & Giff. 415.
(2) (1858) 27 L. J. (Ch.) 844.
(3) 2 P. Wms. 298.
(4) (1885) 54 L. J. (Ch.) 900.

in the debt, and he objects to the debt being paid unless under the direction of the Court.

Copping, for the infant remaindermen. The debt is statute-barred, and on a summons to determine a question of construction any beneficiary can set up the Statute of Limitations: *In re Wenham.* (1) There was no vesting declaration in the appointment of new trustees of March, 1908, and no assignment of any chose in action, and there are therefore no trustees before the Court who have any title to this debt of 3000*l.*, and that precludes any right of retainer.

In *In re Hayward* (2) it was held that where the husband had covenanted to pay 5000*l.* to the trustees of the settlement his widow, who was his legal personal representative, had no right to retain the debt on behalf of the trustees, and in *In re Dunning* (3) Lindley L.J. said that *Cockroft* v. *Black* (4) had reached the furthest point in reference to retainer, and Cotton L.J. pointed out that there were trustees who ought to have taken proceedings and got in the debt. *Cockroft* v. *Black* (4) was a different case, for there the actual creditor took the bond in the name of a trustee instead of to herself. The Countess in this case can only retain on the ground that there was a personal debt due to her from the Duchess, and that she cannot shew.

In the alternative I submit that there was no debt in existence, and if there was it was satisfied by the legacy of 50,000*l.*: *Wathen* v. *Smith* (5); *Cole* v. *Willard.* (6)

Ward Coldridge, K.C., in reply. *In re Hayward* (2) is distinguishable, for that was a case where a limited owner, and not, as here, a beneficiary absolutely entitled, was claiming to retain. When the Duchess took her legacy and left unpaid her husband's debt, she became under a direct liability to the creditor for the amount of the debt and she could have been sued in the absence of the executor: *Hunter* v. *Young.* (7)

Cur. adv. vult.

(1) [1892] 3 Ch. 59.
(2) [1901] 1 Ch. 221.
(3) 54 L. J. (Ch.) 900.
(4) 2 P. Wms. 298.
(5) (1819) 4 Madd. 325.
(6) (1858) 25 Beav. 568.
(7) (1879) 4 Ex. D. 256.

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MARY CAROLINE, DOWAGER DUCHESS OF SUTHERLAND, *In re.* MICHELL *v.* BUBNA (COUNTESS).

July 29. JOYCE J. Mary Caroline, Dowager Duchess of Sutherland died in May, 1912. It appears that upon her first marriage with Mr. Blair, in January, 1872, a settlement was executed containing a covenant by Mr. Blair which has been treated before me as a covenant to pay 3000*l.* to the trustees of the settlement. He died in October, 1883; the widow, who afterwards became the Duchess, was his sole executrix, and there is a direction in the will with reference to the payment of the 3000*l.* It has never been paid, and it was not disputed before me that all right of action, if any, on the covenant I have mentioned was barred before the death of the Duchess in May, 1912. Practically it was admitted that it was statute-barred in 1903 or 1904 or soon afterwards, as the covenantor died in 1883.

The Duchess left her daughter, the Countess Bubna, a legacy of 50,000*l.*, and the first question in the summons is whether the liability of the Duchess as the sole legatee and executrix of the will of Mr. Blair to pay 3000*l.* has been satisfied by this bequest to the Countess;—whether the case was one of satisfaction. This question was not seriously discussed before me, but if it may be assumed that the liability (if any) of the Duchess's estate constituted a simple debt to the Countess I do not see why the legacy should not have satisfied the debt unless it could be prevented from so doing by the direction in the will as to payment of debts.

Question 2 in the summons asks whether, if the Court should be of the opinion that such liability had not been satisfied, the plaintiffs are entitled to retain the sum of 3000*l.* out of the estate of the Duchess. That question, again, was not argued, and for this reason, I suppose, that the plaintiffs, who are trustees of the settlement, did not desire or would not attempt to retain unless ordered to do so.

But a contention not referred to in the summons was raised on behalf of the Countess that she, as one of the legal personal representatives of the Duchess and legatee under her will of 50,000*l.* as well as being tenant for life of a very considerable residue, was entitled out of the assets of the Duchess (I am not sure whether the Countess ever had any of these assets in her

hands or ever will have) to retain the sum of 3000*l.* as a debt due from the Duchess to herself, she being, as it is contended, sole beneficiary in remainder under the settlement I have mentioned. Now as I have said, it is agreed that the liability on the covenant before me was barred. Then the Countess insists on the case of *Cockroft* v. *Black* (1), which was cited to me as shewing that an executor and administrator—I will not say an administrator because an administrator could not do it now by reason of the form of the bond—but an executor could retain a debt due to a trustee for the executor. Now *Cockroft* v. *Black* (1) was not strictly a case of retainer at all when you come to examine it. The trust, such as it was, was a simple trust for the lady who desired to retain; a bond having been given for her benefit by her husband, but, she being a married woman, the bond had been taken to somebody else as her nominee merely because obviously it could not have been taken to her alone, and the person to whom the bond was given was a simple trustee for her and bound to obey her orders in every respect. There Lord Chancellor King said "in strictness of law the executrix in the present case cannot retain, the bond not being made to herself; but since she may pay what bond she pleases first, and as it would be a vain thing for her to pay the 100*l.* to her own trustee with the one hand, and take it back from him with the other, therefore this bond made to her trustee shall be the same in equity as if made to herself." That was not decided as a case of retainer. It was the case of a bond given to somebody else as a mere nominee of the creditor claiming to retain. In fact Sir George Jessel M.R. says in *Talbot* v. *Frere* (2): "An executor had a right to prefer one creditor to another as amongst creditors of equal degree, ... It followed, therefore, that if he was a creditor he had a right to prefer himself to another creditor of equal degree; and this was called 'retainer' because he had the money in his own hands; but it was, in reality, the exercise of the right of preference in his own favour." That is how Sir George Jessel accounted for this doctrine of retainer; but in the later case of *Lee* v. *Nuttall* (3)

(1) 2 P. Wms. 298, 299. (2) (1878) 9 Ch. D. 568, 570, 571.
(3) (1879) 12 Ch. D. 61, 64.

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James L.J. would not have that; he said if that were so the right to retain would cease on a decree for administration, because it was manifest that the decree for administration put an end to the right to prefer. I suppose the real ground of it is that the creditor, being a creditor and also the administrator or executor, would be the defendant in any suit to recover the debt and could not sue himself.

Whether *Cockroft* v. *Black* (1) be right or wrong, however you explain it, Hall V.-C. in *Richmond* v. *White* (2) laid it down that the doctrine is one which the Court is not disposed to extend, and in *Chapman* v. *Turner* (3) the Master of the Rolls, the Hon. John Verney, said "the rule of this Court in cases of retainer is, unless the party can shew a legal right to retain, we never give it him; if he can shew a legal right, we never take it away from him." "If you must come here," said Lord Keeper Wright in *Hopton* v. *Dryden* (4), "you cannot prefer yourself, and a Court of Equity will never assist a retainer." Again Lindley L.J. in *In re Dunning* (5) says "the right of retainer is somewhat an anomalous privilege, and it has often been laid down that it ought not to be extended, and it has never yet been extended to the decree asked for here. The furthest point was reached in the case of *Cockroft* v. *Black* (1), where an executrix being entitled beneficially to the debt due from the testator was allowed to retain, although there was in existence a trustee of the debt for her. The right established by this decision ought to be adhered to and remain uncontroverted, but it ought not to be extended in the way that Pearson J. has extended it in this case. The executrix here is not both debtor and creditor, and therefore she cannot be allowed to retain."

I am not aware of any precedent for such a right of retainer as is now claimed by the Countess being exercised by any one in such circumstances as those of the present case. The liability in question is not a simple debt due to the Countess, but is a debt, if at all, to the trustees of the settlement, who from the very first were the proper and only persons, and are still the proper and only

(1) 2 P. Wms. 298.
(2) (1878) 10 Ch. D. 727.
(3) (1738) Vin. Abr. Exors. (D. 2), pl. 2.
(4) (1701) Prec. Ch. 179, 181.
(5) 54 L. J. (Ch.) 900, 903.

persons, to give a discharge, the only persons proper to sue now if the liability had not been barred. If a retainer be ever allowed to a beneficiary for a debt due to a trustee, it is only when the trust is a simple and absolute trust for the person claiming the right of retainer. A retainer has not been allowed to a beneficiary where the debt was due to trustees of a settlement with various powers and liabilities such as there were in this case, and amongst other liabilities they are the proper persons to pay the duties which fell to be paid upon the death of the Duchess when the Countess became entitled. If the Countess could sue at all, the proper persons for her to sue are the trustees of the settlement, and there is no difficulty in the case by reason of the impossibility of the Countess suing herself, which, as I said before, appears to be the foundation for the right. The Countess, if not an executrix herself, could not have sued the legal personal representatives of the Duchess for this debt. Any action by her must have been against the trustees of the settlement. Therefore I hold that the Countess has no right of retainer in respect of the alleged liability.

Solicitors: *Stanley, Woodhouse & Hedderwick.*

R. M.

C. A.
1914
NEVILLE J.
May 21, 22.
C. A.
Oct. 17.

FRANCIS, DAY & HUNTER *v.* FELDMAN & CO.

[1913 F. 1556.]

Copyright—Literary Work—Song—"First published"—"Issue of copies to the public"—Simultaneous Publication Abroad—Colourable Imitation—Reply Song—Infringement—Injunction—Copyright Act, 1911 (1 & 2 *Geo.* 5, *c.* 46), *ss.* 1, 2, 5, 15, 35.

A song the words of which were composed in America by an American was published simultaneously in New York and London on May 5, 1913. In April, 1913, the owners of the American copyright in the song had sent to the plaintiffs twelve copies of the song with instructions to copyright the song in the United Kingdom on May 5. On that day the plaintiffs sent one copy to the British Museum, one copy they filed for reference in their office, six copies they exposed for sale on the counter of their retail premises in London, and the next day they sent the remaining four copies to the agent for the universities. There was no immediate demand for the song, and after a fortnight the plaintiffs placed the six copies amongst their general stock. The song was first sung in London in July, 1913, and was a great success, and the plaintiffs then purchased the copyright in the song for the British Empire from the American owners, and made large sales. Subsequently the defendants published a song which was based upon the words of the plaintiffs' song and was what was known as an answer or reply song:—

Held by Neville J. and the Court of Appeal, that the plaintiffs' song was "first published" in London on May 5, 1913, and that there had been "an issue of copies to the public" within the meaning of the provisions of the Copyright Act, 1911. But

Held by the Court of Appeal, reversing the decision of Neville J., on the facts, that the defendants' song, although a reply song, was not a colourable imitation of the plaintiffs' song and did not infringe their copyright therein.

Witness Action.

On May 5, 1913, a song called "You made me love you (I didn't want to do it)" was published simultaneously in New York and in Canada by the Broadway Music Corporation of New York, the owners of the copyright in the song, which they had purchased from an American, who was the author and composer of it.

On April 24, 1913, the plaintiffs, who were music publishers, received from the Broadway Corporation of New York twelve

copies of the song with instructions to "copyright" the song in Great Britain on May 5. Accordingly on that day the plaintiffs sent one copy of the song to the clerk in charge of the Copyright Receipt Office at the British Museum, one copy they filed for reference in their office, and six copies they exposed for sale in an open box labelled "New works issued this day" and placed on the counter in the retail department of their business premises in Charing Cross Road, London; and on May 6 they sent the remaining four copies of the song to one Bradford, the agent for receiving copies for the university libraries.

On July 4, 1913, the song was first sung in London at the Chiswick Empire and was a great success, and on August 19, 1913, the plaintiffs acquired from the Broadway Corporation of New York the copyright in the song for the British Empire, excluding Canada.

The action was commenced in November, 1913, and the plaintiffs in their statement of claim alleged that the defendants, by printing, selling, and otherwise disposing of a song called "You didn't want to do it—but you did," had infringed the copyright in the plaintiffs' song; that the words of the defendants' song were based upon and were a colourable imitation of the plaintiffs' song; and they claimed an injunction to restrain the defendants, their servants or agents, from printing, selling, or otherwise disposing of any copy or copies of or from publicly performing or authorizing the public performance of a song called "You didn't want to do it—but you did" or any other song containing any words or phrases or combination of words or phrases taken or colourably altered from the plaintiffs' copyright song called "You made me love you (I didn't want to do it)" or from otherwise infringing the plaintiffs' copyright therein, and consequential relief. By their defence the defendants denied that the plaintiffs were the owners of the copyright in the song "You made me love you (I didn't want to do it)." They alleged that the said song was not first published in any part of His Majesty's dominions to which the Copyright Act, 1911, applied, and that there was no copyright therein; and they denied that their song in any way infringed the copyright in the song alleged to be the plaintiffs'.

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It appeared from the evidence that the plaintiffs did not advertise their song, and that there was no immediate demand for it, and after two or three weeks the six copies on their counter were placed among their general stock. During July they cabled to America for twenty more copies which came to hand in August, and then an English edition of 750 copies was printed. The plaintiffs had since sold over a quarter of a million copies of the song. It also appeared that the defendants' song was based upon the words of the plaintiffs' song and was what was known as an answer or reply song to the plaintiffs' song.

The action came on for hearing before Neville J. on May 21, 1914.

Jenkins, *K.C.*, and *E. J. Macgillivray*, for the plaintiffs. Copyright is not claimed in the music of the song but in the lyrics or words of the song, and it is not now disputed that, if there is copyright therein, the plaintiffs are the owners of it. Our contention is that the song was published simultaneously in America and in England, and that it was "first published" in this country in London on May 5, 1913, within the meaning of the provisions of the Copyright Act, 1911. (1) Copies were

(1) The Copyright Act, 1911, enacts:

Sect. 1: "(1.) Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's dominions to which this Act extends for the term hereinafter mentioned in every original literary dramatic musical and artistic work, if

"(*a*) in the case of a published work, the work was first published within such parts of His Majesty's dominions as aforesaid . . . .

"(2.) For the purposes of this Act, 'copyright' means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever . . . .

"(3.) For the purposes of this Act, publication, in relation to any work, means the issue of copies of the work to the public . . . ."

Sect. 2: "(1.) Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright . . . ."

Sect. 35: "(1.) In this Act, unless the context otherwise requires,—

"'Infringing,' when applied to a copy of a work in which copyright subsists, means any copy, including any colourable imitation, made or imported in contravention of the provisions of this Act . . . .

"(3.) For the purposes of this Act,

sent to the British Museum and to the agent for the universities in accordance with s. 15 of the Act, and the publication was not only not colourable but intended to meet the reasonable requirements of the public. The issue of copies to the public means that if they want the song they can buy it. It was always intended to supply the reasonable demands of the public. Further, on the evidence, the defendants' song is based upon the words of our song, and is such a colourable imitation of our song as constitutes an infringement of our copyright.

Peterson, K.C., and *D. M. Kerly*, for the defendants. First, as to publication. It is submitted that the publication of the plaintiffs' song on May 5 was inadequate. It was colourable only and not intended to satisfy the reasonable demands of the public. There must be an issue of copies to the public, but how can the public be expected to buy if they do not know the thing is there? Publication involves some form of advertisement.

[NEVILLE J. I think "issued to the public" can mean no more than an invitation or a right to the public to acquire copies. Notice of the publication is given to the public by the copies sent to the British Museum and to the universities. I do not say that that satisfies the statute. I think it does not, but "issued to the public" can mean no more than having them on sale. You need not advertise and you need not call the attention of the public to the fact that you have published, if you are prepared to supply on demand. Here, the moment there came a demand they fully satisfied it.]

The publication referred to in s. 35 is the first publication, that is to say, the publication within the fourteen days which is simultaneous with the other. Can it be said that the circumstances of this case shew that the publication, in the sense of issue of copies to the public, was anything but colourable having regard

a work shall be deemed to be first published within the parts of His Majesty's dominions to which this Act extends, notwithstanding that it has been published simultaneously in some other place, unless the publication in such parts of His Majesty's dominions as aforesaid is colourable only and is not intended to satisfy the reasonable requirements of the public, and a work shall be deemed to be published simultaneously in two places if the time between the publication in one such place and the publication in the other place does not exceed fourteen days . . . ."

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to the fact that on May 5 only six copies were placed on the counter of the retail shop for a few days and then disappeared upstairs into the general stock, no more appearing at all till some time in August? It is submitted that first publication within the meaning of the section means a publication of the work of a substantial character, such as would ordinarily come under the head of a publication of a book, and not merely the publication of some five or six copies. Next, as to infringement. That turns on s. 1, sub-s. 1, and ss. 2 and 35 of the Act. It is submitted that "colourable imitation" means the reproduction of a work or of any substantial part of it in any material form. Copyright does not extend to phrases, ideas, or methods—*Hollinrake* v. *Truswell* (1)—and the question is whether the defendants' song can be said to be a substitute for the plaintiffs' song: *Roworth* v. *Wilkes*. (2) Of course the defendants' song is based upon the plaintiffs' song, and the composer had the plaintiffs' song before him or in his mind at the time he wrote it. But it is what is well known as an answer or reply song, and the similitude has arisen necessarily from the nature of the subject.

[NEVILLE J. There is no doubt that it is an answer, and that in making an answer one has to study the things he is answering. But it is not every answer that would be an infringement, and it does not follow that because it is an answer it is an infringement.]

Colourable imitation means a copy purposely so altered that it may plausibly appear not to be a copy. This is not a case in which it can be said that there is a colourable copy of a substantial portion of the plaintiffs' song, because as a matter of fact it is not a copy of the plaintiffs' song. It is a reply song putting just the contrary point of view.

NEVILLE J. The first question that I have to decide is whether there has been publication in England within fourteen days after May 5, 1913, within the meaning of the statute. The material words are "unless the publication in such parts of His Majesty's dominions as aforesaid is colourable only and is not intended to satisfy the reasonable requirements of the public." There

(1) [1894] 3 Ch. 420. (2) (1807) 1 Camp. 94.

you have really a definition of what "colourable only" means. It means a case where there is no intention to satisfy the reasonable requirements of the public. In the present case I find no evidence upon which I could come to such a conclusion. It is quite true that the demand anticipated was insignificant and the supply secured to satisfy the demand was also insignificant. A dozen copies were all that were sent at the time, and it was not until some time afterwards that further copies were applied for and forwarded from America. It seems to me that the intention from the first was to satisfy the public demand in this country. In this case I think that is what the publication in England was for. I hold therefore that there was a good publication in England.

[His Lordship then considered the facts, and came to the conclusion that there had been an infringement, and granted an injunction.]

H. L. F.

The defendants appealed. The appeal was heard on October 17, 1914.

Kerly, K.C., and *G. C. Rankin*, for the appellants. In the first place it is contended that there was no publication of this work sufficient to satisfy the requirements of the Copyright Act, 1911. There was no issue of copies to the public within s. 1, sub-s. 3. The publication was colourable only and not intended to satisfy the reasonable requirements of the public and ought not to be deemed to be a first publication: s. 35, sub-s. 3. "Issue" of copies means more than the "offer" of copies, which used to be enough. "Colourable" means "not bona fide," or "sham." Under the Act there must be an actual transfer of copies to members of the public. At all events publication involves some form of advertisement.

Jenkins, K.C., and *E. J. Macgillivray*, for the respondents.

LORD COZENS-HARDY M.R. I am clearly of opinion that there was a sufficient publication of this work in this country on May 5, 1913.

KENNEDY L.J. and SWINFEN EADY L.J. concurred.

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The Court then proceeded to consider the question of infringement. At the conclusion of the arguments their Lordships held that the question was purely one of fact, and, on a comparison of the two songs, decided that there had been no infringement.

Appeal allowed.

Solicitors: *Strong & Bolden ; Philip J. Rutland.*

H. C. R.

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ODDENINO *v.* METROPOLITAN WATER BOARD.

[1914 O. 357.]

Water—Supply—Restaurant—Option of Board to supply by Meter—Domestic Purposes—Trade or Manufacturing Purpose—Metropolitan Water Board (Charges) Act, 1907 (7 *Edw.* 7, *c. clxxi.*), *ss.* 8, 16, 20, 25.

Under the provisions of s. 20 of the Metropolitan Water Board (Charges) Act, 1907, the Board are not bound to afford a supply of water otherwise than by measure to a house used as a restaurant, notwithstanding that the use to which the water is put is in its nature domestic.

The test whether any house or building is used for any trade or manufacturing purpose within the meaning of s. 20 lies in the character of the house or building and not in the use to which the water is put.

Metropolitan Water Board v. *Avery* [1914] A. C. 118 and *Frederick* v. *Bognor Water Co.* [1909] 1 Ch. 149 distinguished.

TRIAL OF ACTION WITH WITNESSES.

The plaintiff was the occupier of a house or building situate at and being Nos. 60 and 62, Regent Street, in the city of Westminster, and known as the Imperial Restaurant, where he carried on the business of a restaurant keeper within the limits of the defendants' water supply.

On February 16, 1914, the plaintiff, who had been previously supplied under the terms of an agreement, requested the defendants to furnish to him on and from March 25, 1914, a supply of water at the said house for domestic purposes in accordance with the provisions of s. 8 (1), of the Metropolitan Water Board

(1) See note on p. 743, post.

(Charges) Act, 1907, and, the defendants having refused to furnish a supply under those provisions, brought this action, in which he claimed a declaration that he was entitled under s. 8 to be furnished at the said house with a sufficient supply of water for domestic purposes at a rate per annum not exceeding 5 per cent. of the rateable value of the said house.

The defendants by their defence and counter-claim relied on s. 20 of the Act and pleaded that the house or building or a part thereof was used for a trade or manufacturing purpose for which water was used, namely, the trade of a restaurant keeper, and that they declined to afford a supply of water thereto otherwise than by measure in accordance with the terms of s. 20, and counterclaimed for a declaration accordingly.

It was admitted that some portion of the water supply was or had been used by the plaintiff for admittedly non-domestic purposes, such as fire extinction and flushing drains by means of apparatus discharging automatically, but it was intended that the supply should be so altered as to be used for domestic purposes only, and the arguments of counsel proceeded on this assumption for the purpose of obtaining a decision on the general question involved.

Walter Ryde, K.C., and *Courthope-Munroe, K.C.*, for the plaintiff. The plaintiff is entitled to a supply under s. 8, and s. 20 has no application to the case. To bring the case within s. 20 the house or part thereof must be used for a "trade or manufacturing purpose." There is no substantial difference between these words and the words "trade manufacture or business" in s. 25, and it is now established by the decision of the House of Lords that reading ss. 8 and 25 together the true test of domestic purposes is not whether the water is consumed or used in the course of the trade, but whether the user of the water is in its nature domestic: *Metropolitan Water Board* v. *Avery* (1); *Pidgeon* v. *Great Yarmouth Waterworks Co.* (2); *Colley's Patents* v. *Metropolitan Water Board.* (3) These authorities shew that though the supply is used in and for the purposes of trade, yet if

(1) [1914] A. C. 118. (2) [1902] 1 K. B. 310.
(3) [1912] A. C. 24.

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the user is in its nature domestic it falls within s. 8, and it makes no difference that the persons catered for are not inmates of the house. Applying a similar interpretation to the words "trade or manufacturing purpose" in s. 20 the result is that s. 20 only comes into play where part of the supply is non-domestic within the meaning of those authorities. The only distinction between *Metropolitan Water Board* v. *Avery* (1) and the present case is that that was a decision on the words "trade manufacture or business" in s. 25, but it is hardly possible in the same Act to put a different interpretation on almost similar words in s. 20. In any case the decision of Eve J. in *Frederick* v. *Bognor Water Co.* (2) was a decision on a section of a special Act undistinguishable from s. 20 and is a direct authority in our favour.

Romer, K.C., and *J. Goodland*, for the defendants. The Board are entitled to exercise the option of supplying by measure given to them by s. 20. The intention of the Legislature in s. 20 was not to draw any distinction between domestic and non-domestic supply, but to relieve the Board in the cases provided for from the hardship of furnishing a supply under s. 8 as interpreted by the authorities. In other words s. 20 gives the Board an option of excluding from s. 8 cases which would otherwise fall within it. There is no need to apply the decisions on s. 25, which is not a definition clause in the true sense, to s. 20, the language of which is perfectly plain in itself. The speeches of the Law Lords in *Metropolitan Water Board* v. *Avery* (1) are addressed to the distinction between domestic and non-domestic supply for the purpose of interpreting ss. 8 and 25, and there is nothing in those speeches or in the judgments in the earlier cases which compels the Court to construe s. 20 otherwise than in accordance with its natural and obvious meaning. The special Act in *Frederick* v. *Bognor Water Co.* (2) is distinguishable from the present Act. The difficulty in that case was that unless the owner was entitled to a domestic supply he was not entitled to any supply at all. [They also cited *Chester Waterworks Co.* v. *Chester Union.* (3)]

Walter Ryde, K.C., in reply. The scheme of the Act in

(1) [1914] A. C. 118.
(2) [1909] 1 Ch. 149.
(3) (1908) 98 L. T. 701; 72 J. P. 121; 6 L. G. R. 446.

charging by a rate according to annual value necessarily involves inequality, since a large house in a poor neighbourhood will probably pay at a less rate for its supply than a small house in a good neighbourhood. Under s. 8 the Board must always be content with an average, and the notion of hardship ought not to enter into the question whether the payment is to be by rate under s. 8 or by measure under s. 20.

SARGANT J. The plaintiff in this case occupies a well-known restaurant situate in Regent Street called the Imperial Restaurant, where he carries on the business of a restaurant keeper. He has hitherto been receiving a supply of water from the Metropolitan Water Board by meter at a certain rate of about 8*d.* per one thousand gallons. He now seeks to obtain his supply from them at a rate not exceeding 5 per cent. of the rateable value of his restaurant. The question is whether the Board can decline to give him a supply at this latter rate or otherwise than by meter as they are now doing. The question is a very important one affecting a large number of cases. The case will no doubt go to a higher, probably to the highest, tribunal, and inasmuch as it has been very fully argued before me I see no reason why I should postpone giving my judgment.

The question really turns on the construction of four sections of the Metropolitan Water Board (Charges) Act, 1907. Those are ss. 8, 16, 20 and 25. By s. 8 the Board is put under an obligation to supply water for domestic purposes at a charge based on the rateable value of the premises, or at what is sometimes called a flat rate, irrespective of the amount of water consumed. That is for domestic purposes. By s. 16 they are compelled to give a supply of water for non-domestic purposes by means of a meter and at a charge based upon the amount of water consumed. By s. 20, which is really the most important section in the Act for the present purpose, they are relieved in the cases there specified from the obligation of affording a supply of water otherwise than by meter. I will read the exact words of the section: "The Board shall not be bound to afford a supply of water otherwise than by measure to any house or building whereof any part is used for any trade or manufacturing

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purpose for which water is used or to any common lodging-house barracks workhouse or other public institution or building," and then a subsequent part of the section provides that in such cases they are to provide by meter on the terms of s. 16.

Then comes s. 25, which is stated in the marginal note to be a section defining "domestic purposes," but which certainly does not go to that length. It may have been intended to in some way elucidate or indicate the meaning of "domestic purposes," but even in that smaller object it appears not to have been entirely successful.

In this case it is clearly established that the water supply taken by the plaintiff has, in the words of Lord Atkinson in *Metropolitan Water Board* v. *Avery* (1), been "supplied directly in and for" the business and has been "used in the conduct of" the business. The evidence is quite clear that the water has been used for the various purposes for which the business is carried on. In view of that fact I should have thought, apart from the authorities to which I am about to refer, that the terms of s. 20 had obviously been brought into play. The house or building is being used for a trade purpose, namely carrying on the business of a restaurant, for which water is used, and that being so, the Board are entitled prima facie on the obvious construction of s. 20 to refuse a supply of water otherwise than by meter. That view was obviously the view of both of the parties to the present action until the occurrence of certain decisions to which I am about to refer, and the supply has been given accordingly. What has originated, and very properly originated, the claim made in this action is a series of decisions culminating in one in the House of Lords in *Metropolitan Water Board* v. *Avery* (2), approving *Pidgeon* v. *Great Yarmouth Waterworks Co.* (3) and *Colley's Patents* v. *Metropolitan Water Board.* (4) The net effect of those decisions has been to put an interpretation on the words "domestic purposes" as used in s. 8 of the Act, but not necessarily to put any interpretation upon any words used in s. 20 of the Act. The phrase "domestic purposes" does not

(1) [1914] A. C. 128.
(2) [1914] A. C. 118.
(3) [1902] 1 K. B. 310.
(4) [1912] A. C. 24.

occur in s. 20, and the actual phrase used in s. 25 "any trade manufacture or business" does not occur in s. 20, though s. 20 does use a more or less analogous phrase, "trade or manufacturing purpose."

Now I rather protest against introducing confusion in a case where the language of an Act is reasonably clear with regard to the material section by referring to decisions on an altogether different section of the Act which by the unanimous testimony of all the judges who have dealt with it is an extremely ill-drafted and confusing section, and unless I am bound to do so by the force of those decisions I do not feel disposed to alter the construction which ought in my mind to be put upon the fairly plain words of s. 20. Further, on a careful consideration of *Metropolitan Water Board* v. *Avery* (1) it seems to me that the real effect of that decision is that where water is not only being supplied for domestic purposes, but is also being supplied for those purposes in the course of a trade or business carried on by the person taking the supply, then the fact that it is supplied for domestic purposes is of more importance than the fact that it is being used in a trade or business. In fact, to use the words of Lord Dunedin (2), those words in s. 25 "any trade manufacture or business" do not actually define the expression "domestic purposes," but constitute a "warning note" to provide against an undue inflation of the term "domestic purposes." An example of an extension of the term which might be prohibited by those words has occurred to me as follows: An owner might be carrying on in his own house a trade or business in the ordinary sense, and he might be taking in the course of that trade or business a supply of water for purposes clearly not domestic in the ordinary sense of the word. In that case the warning note in the section prevents its being said that the supply was a supply for domestic purposes because the trade, manufacture, or business was carried on domestically—that is within the house of the user. But however that may be, I cannot find that the effect of s. 25 is in any way to put a definition for the purposes of the other sections of the Act on the word "trade" or on the word "manufacture." The net result really is that when, as Lord Atkinson

(1) [1914] A. C. 118. (2) [1914] A. C. 123.

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puts it (1), water is "supplied directly in and for" a business, and is "used in the conduct of it," nevertheless, if the business is such that the use of the water is for domestic purposes, that use is covered by the flat rate paid under s. 8. Buckley L.J. put it very clearly in words which are adopted by the House of Lords (2), that the test really is the purpose for which the water was being used and not the character of the building in which the water was being used. That is unquestionably so under s. 8 coupled with s. 25, but in my judgment the test indicated by s. 20 is precisely the contrary of that arising under s. 8 and s. 25. In my opinion, on the clear language of s. 20 the test is the character of the house to which the water is being supplied and not the purpose to which the water is actually being put. The Board are exempted from supplying water otherwise than by meter "to any house or building whereof any part is used for any trade or manufacturing purpose for which water is used," that is to say, directly it can be predicated of a house that it or any part of it is used for a trade or manufacturing purpose for which water is used the option is given to the Board to refuse to supply that house otherwise than by meter.

It is quite clear that s. 20 does not fit into any particular space left by s. 8 or s. 16. Sect. 8 and s. 16 together cover all the ground, while the effect of s. 20 is to give an option to the Board as to certain parts of the ground, and the real question to be determined is what is the extent of the area over which the option extends. Mr. Ryde really admitted in fact if not in terms that the result of his argument was that the section would have to be read in the same way as if it had provided that the option of the Board should extend only to any house or building whereof any part is used for any trade or manufacturing purpose for which a non-domestic supply of water is used, or for which water is used for non-domestic purposes. I do not see on principle why any such words should be introduced. It seems to me that the object of s. 20 is this. Under s. 8 persons are entitled to take for domestic purposes at a flat rate, it being assumed that the amount taken

(1) [1914] A. C. 128. (2) [1914] 1 K. B. 239; [1914] A. C. 124.

for domestic purposes is more or less in proportion to the annual value of the house, and that therefore so far as domestic purposes are concerned it is not in general necessary to have a meter, but a flat rate may fairly be imposed. On the other hand in the case of non-domestic purposes, where it is obviously impossible to say what will be the amount of water consumed relatively to the value of the premises, the supply has to be given under s. 16 by meter. There it is obvious that the charge is automatically proportionate to the use made. But it must have been present to the minds of the promoters of the Act that there might be many cases in which a house or part of a house was being used for a trade or for manufacturing purposes and in which nevertheless a supply of water might be wanted for domestic purposes. In that case the Legislature provided by s. 20 that the Board might protect themselves by saying that they would only supply on the basis of a meter charge. Mr. Ryde suggested that this was merely to guard against the danger of a use for non-domestic purposes of the water supplied at the flat rate for domestic purposes. But I think that the Legislature may also have recognized that, although domestic purposes might be the only purposes to which the water was put, still, if those domestic purposes embraced the carrying on a trade or business such as a restaurant or the supply of baths to the public, the use of the water would not necessarily be in any way proportionate to the rateable value of the premises, and so the option should be given there also. At any rate I can see no sufficient reason for limiting the clear words of the section to the smaller class of cases suggested by Mr. Ryde.

I can find nothing in the speeches in the House of Lords or in any of the judgments in the inferior Courts in *Metropolitan Water Board* v. *Avery* (1) which in any way enables me to limit the prima facie meaning of the words used in s. 20, and indeed I do notice that Lord Atkinson, if I refer to a passage in his speech (2), does look upon s. 25 as one designed rather to enlarge than to diminish the operation of s. 20.

That being so, there is only one other case to which I think it necessary to refer, the decision of Eve J. in *Frederick* v. *Bognor*

(1) [1914] A. C. 118. (2) [1914] A. C. 131.

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Water Co. (1) In that case not only was the language of the special Act slightly different from the language of the present Act, but the scheme of the Act was different in many respects from that of the present Act, and in one respect particularly so, namely, that unless the argument of the plaintiff in that case had been acceded to there was no obligation whatever on the part of the water company to supply him with water on any terms at all. Here it is quite clear that the plaintiff has a right to be supplied in one way or another either on the rateable value or by meter and in each case at a charge certain, and therefore the consideration which may well have been the determining consideration in that case is not present here. Nor do I think that in endeavouring to ascertain the meaning of this particular Act I shall derive much assistance by going elaborately through the decision given by another judge on another Act and then trying to point out the differences or the similarities between the one Act and the other. In my view the effect of s. 20 is reasonably clear apart from authorities, and I decide that according to its true interpretation the plaintiff in this case is not entitled to a supply of water for domestic purposes in his restaurant otherwise than by meter.

In using the phrase "for domestic purposes" I have in mind this fact. It does appear that at the present time the plaintiff is taking water for one or two purposes, such as I think the flushing of urinals and possibly the feeding of a trout tank, which cannot be considered to be domestic purposes, and which Mr. Ryde frankly confessed, at any rate as to the flushing of urinals, were not domestic purposes, and that being so, even on Mr. Ryde's interpretation of s. 20 the defendants have been entitled and are still entitled so long as the present system of supply is continued to charge by meter, and at the rate at which they have been charging. The parties, however, were not desirous that that short cut should be taken to the determination of this case, and it was arranged that if my decision had been the other way the supply should be so altered from and after the end of the present quarter as that the supply henceforth should be only for domestic purposes as interpreted in *Metropolitan Water Board* v. *Avery*. (2) I have, therefore, dealt with

(1) [1909] 1 Ch. 149. (2) [1914] A. C. 118.

the case for the purposes of my decision as if the supply had been throughout a supply to the plaintiff for domestic purposes only. Accordingly I make the declaration that is asked by the defendants on their counter-claim and I give the costs of the action and the counter-claim to the defendants.

Solicitors: *Allen & Son; Walter Moon.*

NOTE.—The Metropolitan Water Board (Charges) Act, 1907, s. 8: "Subject to the provisions of this Act the Board shall at the request of the owner or occupier of any house or building or part of a house or building occupied as a separate tenement in any street within the limits of supply in which any service main or service pipe of the Board shall be laid or of any person who under the provisions of this Act shall be entitled to require a supply of water for domestic purposes furnish to such owner or occupier or other person by means of a communication pipe or communication pipes and other necessary and proper apparatus to be provided and laid down and maintained by him and at his cost a sufficient supply of water for domestic purposes at a rate per annum which shall not exceed five per centum of the rateable value of the house or building or part of a house or building in respect of which the supply is required and such rate shall subject to the provisions of this Act be charged uniformly under like circumstances to all consumers entitled to such supply."

Sect. 9: "Where under the foregoing provisions of this Act the Board furnish a supply of water for domestic purposes to any house or building or part of a house or building occupied solely for the purposes of any trade or business or of any profession or calling by which the occupier seeks a livelihood or profit and occupied as a separate tenement which is assessed to the poor rate or other rate in which such last mentioned rate is included in a sum exceeding three hundred pounds per annum and is not charged with the payment of inhabited house duty the Board shall make or allow from the water rate payable in respect of such supply a rebate or discount of such amount (not being less than twenty per centum or more than thirty per centum of such water rate) as the Board may from time to time determine and such rebate or discount shall from time to time be made or allowed from the water rate payable in respect of every such supply as aforesaid and at a uniform rate per centum: Provided that in making or allowing such rebate or discount the water rate shall not in any case be less than would have been payable in respect of any house or building or part of a house or building occupied as a separate tenement assessed to the poor rate or other such rate as aforesaid in a sum of three hundred pounds per annum."

Sect. 16 (to which the side note is "Supply by measure"), sub-s. 1: "The Board shall at the request of any owner or occupier of any premises situate in or adjoining any street in which any main or service pipe of the Board is or shall be laid who requires for use on such premises a supply of

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water by measure for purposes other than domestic and by means of communication pipes and other necessary and proper apparatus to be provided laid and maintained by and at the cost of the person requiring such supply afford a supply of water by means of a meter or other fit and sufficient instrument or apparatus supplied (at the cost of such person aforesaid) or approved by the Board for measuring and ascertaining the quantity of water so supplied."

Sub-s. 2 specifies the rates to be charged for every 1000 gallons, and sub-ss. 3 and 4 contain other ancillary provisions.

Sect. 20: "The Board shall not be bound to afford a supply of water otherwise than by measure to any house or building whereof any part is used for any trade or manufacturing purpose for which water is used or to any common lodging-house barracks workhouse or other public institution or building:—

"Provided that where the Board decline to afford otherwise than by measure any such supply as aforesaid they shall if required by the person who but for the provisions of this section would have been entitled to demand such supply furnish to the building in respect of which the supply is required a sufficient supply of water upon and subject to the terms and conditions contained in the section of this Act relating to 'supply by measure' and subject to the next following proviso (that is to say)

"Provided that (except in the case of a supply by measure under this section to barracks or other buildings for the time being in the occupation of His Majesty or of any department of His Majesty's Government for public purposes) the Board may require that the sum to be paid for any such supply by measure shall not be less than the sum which would have been chargeable in respect of such supply had the supply been given under the provisions of this Act which relate to the supply for domestic purposes otherwise than by measure and the charges therefor.

"For the purposes of this section the expression 'public institution or building' shall not include any hospital or sanatorium wholly or partly supported by endowments or voluntary contributions and not carried on for purposes of private profit or gain."

Sect. 24: "The Board may notwithstanding anything contained in this Act by agreement with any person or body desiring a supply of water for any purpose in any part of the limits of supply furnish such supply upon such terms and conditions as to payment and otherwise as may be agreed upon:

"Provided that nothing in this section shall prejudice or affect the terms upon which any person or body is under the provisions of this Act entitled to require a supply of water for any purpose:

"Provided also that the terms and conditions on which a supply of water is given by the Board under this section shall be the same under like circumstances to all consumers."

Sect. 25: "In and for the purposes of this Act the expression 'domestic purposes' shall be deemed to include water closets and baths constructed or fitted so as not to be capable of containing when filled or filled up to the

overflow or waste pipe (if any) more than eighty gallons but shall not include a supply of water for any of the following purposes (namely):—

"Steam gas motor and other like engines;

"Railway purposes;

"Ventilating purposes;

"Working any machine or apparatus;

"Consumption by or washing of horses or cattle;

"Washing carriages or other vehicles;

"Watering gardens by means of any outside tap or any hose tube pipe sprinkler or other like apparatus;

"Fountains or any ornamental purposes;

"Cleansing sewers and drains;

"Cleansing and watering streets or roads;

"Fire extinction;

"Flushing drains by means of any apparatus discharging automatically;

"Public pumps baths or wash houses;

"Any trade manufacture or business;

"Any bath constructed or fitted so as to be capable of containing when filled or filled up to the overflow or waste pipe (if any) more than eighty gallons."

A. C.

CHAPPELL & CO., LIMITED *v.* COLUMBIA GRAPHOPHONE COMPANY.

[1913 C. 2290.]

Copyright—Music—Assignee of Musical Copyright—Copyright in Song with Pianoforte Accompaniment—Record for Mechanical Performance—Copy made for Purpose of making Orchestral Accompaniment to be recorded on Graphophone Disc—Single Copy—Right to make Discs on Notice to Author—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 1, *sub-s.* 2; *s.* 19, *sub-ss.* 2, 7.

The rights given by the Copyright Act, 1911, to the author of a musical production to restrain the manufacturer of records for mechanical reproduction of the music, and to other persons to make such records upon giving notice to the author and paying royalties to him, do not affect any copyright vested in an assignee under an assignment made before the Act. The making of a single copy of a song with pianoforte accompaniment, the copyright of which is vested in such an assignee, for the purpose of making an orchestral accompaniment, is an infringement of the assignee's copyright, and is not justified because it is done for the purpose of making a graphophone disc of and for which the

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notice and royalties prescribed under the Act have been given and paid to the author.

Judgment of Neville J. ante, p. 124, affirmed.

APPEAL from a decision of Neville J. (1)

The plaintiffs in this action were the owners of the copyright in the music of a song called "Where my caravan has rested." The author of the song was Hermann Lohr, and he had assigned his rights to the plaintiffs in 1907. The song had been published by the plaintiffs with a pianoforte accompaniment. The defendants on or about March 13, 1913, gave to the plaintiffs and Hermann Lohr notice of their intention to make contrivances by means of which the music could be mechanically performed. These notices were given in the manner prescribed by, and contained the particulars required by, the Copyright Royalty System (Mechanical Musical Instruments) Regulations issued under the Copyright Act, 1911. The defendants had caused the music to be recorded on graphophone discs in the form of an orchestral accompaniment to the song. For the purpose of recording such an orchestral accompaniment they purchased a copy of the song with pianoforte accompaniment and made a copy thereof for the purpose of making orchestral arrangements therefrom. They had paid the author the royalties he was entitled to under the Act of 1911. The plaintiffs brought this action for an injunction to restrain the defendants from making copies of the music of the song without their consent, for delivery up of copies, and damages.

The defendants alleged that they had only done what was reasonably necessary for recording the music in the form of an orchestral accompaniment which they contended they had a right to do under the Act of 1911.

Neville J. granted an injunction and made an order for delivery up of copies and records.

The defendants appealed.

E. J. Macgillivray, for the appellants. The appellants have not infringed the respondents' rights. The mechanical rights under the Act of 1911 are vested in the author and not in the

(1) Ante, p. 124.

owner of the copyright: s. 19, sub-s. 7 (*c*), of the Copyright Act, 1911. What the appellants have done is to make an orchestral edition in manuscript of the song for the purpose of reproducing it by means of a graphophone disc. The mechanical rights under the Act of 1911 involve the right to do this upon giving the notices prescribed by the Act and paying the necessary royalties to the author. This is no infringement as against the owners of the copyright in the song. The song was published by the respondents with a pianoforte accompaniment in November, 1909, the copyright having been assigned to them by the composer on June 7, 1907. On July 1, 1912, the Copyright Act, 1911, came into operation. It contemplates the making of alterations necessary for the purpose of producing the records or contrivances for the mechanical performance of the work. In March, 1913, the appellants employed a musician to make an orchestral score of the song, and one copy only was made for the purpose of producing the graphophone disc. The effect of the Act was considered in *Monckton* v. *Pathé Frères Pathephone*. (1)

It is material to consider what the law was before the Act of 1911. It was embodied in the Copyright Act, 1842, s. 2 of which provides that the word "copyright" shall be construed to mean the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the word is applied in the Act; and s. 15 gives the proprietor of the copyright a remedy by action in the case of infringement. Under that Act it was held that in order to constitute an infringement there need not be a printed copy; a copy in manuscript was sufficient. Sect. 20 extended to musical compositions the benefits of the Dramatic Copyright Act, 1833 (3 & 4 Will. 4, c. 15): *Karno* v. *Pathé Frères*. (2)

In *Boosey* v. *Whight* (3) Stirling J. held that perforated paper rolls for use in a mechanical wind instrument, so far as they contained perforations, were part of the instrument and were not sheets of music within the Act of 1842, but that the addition to the rolls of directions as to time and expression was an infringement of the plaintiff's copyright. That was affirmed by the

(1) [1914] 1 K. B. 395. (2) (1909) 25 Times L. R. 242.
(3) [1899] 1 Ch. 836.

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Court of Appeal as to the perforations, but reversed as to the printed directions. (1) That case shews that the purpose for which the copies are made is very material, and it was followed by Sutton J. in *Newmark* v. *National Phonograph Co.* (2)

Then followed the Musical (Summary Proceedings) Copyright Act, 1902 (2 Edw. 7, c. 15), and the Musical Copyright Act, 1906 (6 Edw. 7, c. 36), which were intended to put an end to musical piracy. They were not repealed by the Act of 1911 as was the Act of 1842. The Act of 1902 by s. 3 defines "musical copyright"; it does not enlarge the right but gives additional remedies. It was merely a declaration of the existing law. The Act of 1906 provides still further remedies, and by s. 3 defines the expressions "musical work" and "pirated copies." The effect of that section also was merely declaratory. Those two Acts were construed in *Mabe* v. *Connor*. (3)

It has never been held that the making of a single copy or adaptation is an infringement: *Warne & Co.* v. *Seebohm*. (4)

[LORD COZENS-HARDY M.R. referred to *Novello* v. *Sudlow*. (5)]

That case does not cover this point; further, it was a decision under the Act of 1842, and our rights depend on the Act of 1911. (6) Sect. 1, sub-s. 2, of the last mentioned Act defines

(1) [1900] 1 Ch. 122.
(2) (1907) 23 Times L. R. 439.
(3) [1909] 1 K. B. 515.
(4) (1888) 39 Ch. D. 73.
(5) (1852) 12 C. B. 177.
(6) Copyright Act, 1911, s. 1, sub-s. 2: "For the purposes of this Act, 'copyright' means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; and shall include the sole right,— . . . .

"(*d*) In the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered."

Sect. 19, sub-s. 2: "It shall not be deemed to be an infringement of copyright in any musical work for any person to make within the parts of His Majesty's dominions to which this Act extends records, perforated rolls, or other contrivances by means of which the work may be mechanically performed, if such person proves—

"(*a*) That such contrivances have previously been made by, or with the consent or acquiescence of, the owner of the copyright in the work; and

"(*b*) That he has given the prescribed notice of his inten-

"copyright," and clauses (*a*), (*b*), (*c*), (*d*) are only added by way of explanation, not to confer any new right. Sect. 2, sub-s. 1, alters the rights of the owner and it shews that there was no intention to preserve the old rights intact. Sect. 19, sub-s. 2, shews that the right to make mechanical contrivances includes a right to make alterations. By sub-s. 7 the author is the owner of the right to make mechanical records of musical works notwithstanding an assignment; and this provision also operates to give a copyright to the person who has made the mechanical record. To adapt a composition to a record parts of it may have to be excised and the rest joined together in the proper way. That can be done under sub-s. 2 without infringement. We were entitled to make the record and were therefore justified in using the means for doing so, including making one copy of the pianoforte accompaniment. Without that the record could not have been made and the provisions of the Act would have been useless. A manufacturer who by alteration of the score produces an orchestral record is himself entitled to copyright in that record: s. 19, sub-ss. 1, 8. The object was to secure the rights of the author and the manufacturer against the publisher, and prevent a publisher who has taken an assignment from getting a monopoly. What we have done is to make a new work. The purpose for which our copy was made is

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tion to make the contrivances, and has paid in the prescribed manner to, or for the benefit of, the owner of the copyright in the work royalties in respect of all such contrivances sold by him, calculated at the rate hereinafter mentioned."

Sub-s. 7: "In the case of musical works published before the commencement of this Act, the foregoing provisions shall have effect, subject to the following modifications and additions:— . . . .

"(*c*) Notwithstanding any assignment made before the passing of this Act of the copyright in a musical work, any rights conferred by this Act in respect of the making, or authorising the making, of contrivances by means of which the work may be mechanically performed shall belong to the author or his legal personal representatives and not to the assignee, and the royalties aforesaid shall be payable to, and for the benefit of, the author of the work or his legal personal representatives."

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material. An intention to infringe is a test of whether there has been infringement. At all events there ought not to be an order for delivery up of the record, for the making of it was no infringement as against the plaintiffs, whatever it may have been as against the author. The right to print and publish is not the same as the right to reproduce mechanically.

Hon. S. O. Henn Collins, for the respondents. This is a very simple case. There is no question whether or not making a record or a single copy was an infringement under the old law. This case falls within the Act of 1911. Apart from s. 19 of that Act this is an infringement, and s. 1, sub-s. 2, which speaks of reproduction "in any material form whatsoever," covers the case of a single copy. Under s. 19 the author may be compelled to grant a licence. The only subject-matter of copyright is the manuscript of the author. Sub-ss. 2 and 7 merely state the conditions under which persons may manufacture graphophone records. They do not confer a right to interfere with the rights of others, except those comprised in mechanical reproduction. Even if as against the author the appellants were entitled to do what they have done they could not do it as against us. They have reproduced a work in respect of which they have not brought themselves within the present Act. The disc ought to be delivered up, for reproductions can be made from it at any time. It is an infringement within s. 35. Any person whose copyright has been infringed can take advantage of the remedies given by the Act.

E. J. Macgillivray in reply. Assuming that the manuscript copy was an infringement, making the record was not. That distinguishes this case from *Hole* v. *Bradbury* (1), referred to at p. 657 of Seton's Judgments and Orders, 7th ed. Therefore at all events the order for delivery up should be confined to the manuscript. The claim should be treated as merely an action for damages.

LORD COZENS-HARDY M.R. This is an appeal from Neville J.; it has been elaborately argued before us, and having regard to the importance of the case and out of respect to the argument

(1) (1879) 12 Ch. D. 886.

it would not be satisfactory if I simply said that I agreed with Neville J.'s judgment and the reasons which he has given for it. [His Lordship stated the facts.]

We have heard an elaborate discussion upon the rights which were conferred by the assignment in 1907, and what would be an infringement of those rights, and whether it was an infringement prior to the Act of 1911 to make one copy of a copyright piece of music. In my opinion it clearly was. I think it is impossible to read the very important judgment of the Court of Common Pleas delivered by Talfourd J. in *Novello* v. *Sudlow* (1) without arriving at that conclusion. That judgment has been read in full in this Court, and I do not think it necessary to say anything more about it. If there could have been a doubt before the Act of 1911, or if anybody could with reason have suggested that there was no infringement, unless a number of copies were made, or multiplied in the sense of the multiplication table, it is impossible under the Act of 1911 to listen to any such contention. "Copyright" means under s. 1, sub-s. 2, "the sole right to produce or reproduce the work or any substantial part thereof." It therefore seems to me that there is no foundation for the argument, either under the old Act or under the new, that it was not an infringement of the copyright vested in the assignees to make one copy and one copy only of the work.

If that be so we start with this, that the defendants undoubtedly were guilty of an infringement of the copyright. How do they attempt to justify it? They say, "Oh, there is something in this Act which justifies us in taking without payment and without compensation the copyright which was vested in Messrs. Chappell & Co. by the assignment of 1907"; and they base their argument on this ground, that under s. 19 of the Act of 1911 they (the defendants) were told, "You may by your contrivances—by mechanical methods —reproduce a thing with certain alterations, and the assignment being before the Act of 1911 the mechanical rights are not vested in the assignees but remain in the composer." That is true. Messrs. Chappell & Co. have not the mechanical rights, but it is a long step to say that, in consequence of that,

(1) 12 C. B. 177.

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their copyright may be infringed in order to enable the mechanicians to do that which, as between the composer and themselves, they might have been entitled to do on giving notice and paying the royalty. I cannot find anything to give colour to a suggestion that s. 19 in any way deprives the plaintiffs of the copyright which they have, and prevents them from saying that the copy as made by the defendants was an infringement of their copyright. It is said, "Oh, section 19 would be inoperative unless that were so." The answer is that the defendants must make terms with the publishers, who are the assignees. Subject to that, as between the composer who has the mechanical rights and the defendants who want to reproduce, they have a free hand on complying with the terms of the Act. There is nothing to justify the defendants in doing what it seems to me they have done wrongfully, infringing the copyright which is properly vested in Messrs. Chappell & Co. by the assignment of 1907.

If that is right it is really a very short case. I do not propose to go through all the sections of the Act. It is quite true, as counsel for the appellants urged, that the right of copyright, the right of sole production, is not given under all circumstances, but is subject to certain qualifications. The answer is that those qualifications are found in s. 2, and no one of them has any application to the present case; and except so far as an exception can be found on the face of the Act the sole right of reproduction remains vested in the owners of the copyright. That being so, the learned judge in his judgment, which is very pointed and very brief, says that it is a clear case of infringement of copyright, and there is nothing to justify the defendants in taking away without compensation a right which was vested in the plaintiffs, the assignees of the copyright. I agree with that.

As to the form of the judgment, I think the authorities which have been cited justify us in saying that this is a case in which things have been produced by the use of the infringing copy, and it is a case in which it is right to hand over those, including the matrix and the records which have been made, for destruction. In my opinion the decision appealed against is right and the appeal must be dismissed with costs.

KENNEDY L.J. I am of the same opinion, and after what has been said in the judgment delivered by my Lord, and after the judgment of Neville J. in the Court below, which is very clear and pointed, there is very little indeed that I desire to add; but I will say something further out of respect for the care and ingenuity with which this appeal has been argued before us.

The plaintiffs are the assignees and owners of the copyright in this particular musical work. What their rights are as against the present defendants must be measured by the Copyright Act of 1911. It has been sought under that Act to justify what to my mind was plainly an infringement of the plaintiffs' rights by the defendants, who were anxious to have a mechanical reproduction of the musical work in the form of graphophone records. In order to obtain those records and to make the matrix out of which those records are formed, they did that which was an infringement, because it was the taking of the musical work as published by the plaintiffs, who were the assignees and owners, and then reproducing that with orchestration, and for that purpose having some eight parts for different instruments worked out. It would seem to be suggested that, because there was only this one copy made, it would not constitute an infringement, and further that it was not an infringement under the Copyright Act, 1911, because it was a copy with alterations made for the purpose of doing that which, as against the plaintiffs, the defendants were entitled to do, namely, to create a mechanical reproduction of the music; that, as under the Copyright Act, 1911, they were as against the plaintiffs, who were not the authors of the work, entitled to make the mechanical reproduction, therefore the creation of something used in order to produce that reproduction could not be treated as a violation of the plaintiffs' copyright. To my mind the end does not justify the means in that way, and what they ought to have done was, by a proper arrangement with the plaintiffs, to have acquired the right to take that step, and that, unless they so arranged, it was manifestly an infringement of the plaintiffs' rights. That being so, it does not seem to me that there is really anything more to be said. Are the defendants protected by the Copyright Act of 1911. I look at that Act. I find no protection. It gives, no

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doubt, a right to mechanical reproduction which rests with the owner and not with the publisher; but if, in order to create the record, you must pirate the work of the publisher you are clearly, in my view, liable in damages for that piracy.

I confess I have been unable to follow an argument which was largely based upon s. 19, sub-s. 2, proviso (1.), of the Act allowing for alterations. There is no doubt in the present case that while the orchestration contained fuller elaboration of the music that which the defendants did did take that which belonged to the plaintiffs.

With regard to the remedy, I should be sorry to suppose that in this, which is practically an action of tort, it could have been successfully argued that all the damage the plaintiffs were entitled to was the damage up to the date of the bringing of this action, by reason simply of the defendants having infringed their copyright with regard to the musical score, so that the defendants could reap all the proceeds of their wrong-doing by the further sale of the records. That is putting it, perhaps, more strongly than the learned counsel put it, and in justice to him I should add that he said that if there was any claim for damages let it be a claim for damages. It seems to me that on the authority which has been cited, which is not a direct authority but a good authority by analogy, as to the form of judgment, the order that was made by my brother Neville was quite right. The appellants cannot be allowed, having done this thing, to retain the benefit, and the Court has the power to take care that that which has been created by the infringement shall cease to exist in derogation of the rights in law unquestionably possessed by the plaintiffs.

Swinfen Eady L.J. I too am of opinion that this appeal fails. [His Lordship stated the facts and continued:] The defendants claim the right to do what they have done under s. 19 of the Act of 1911, which says in sub-s. 2 that it shall not be deemed to be an infringement of copyright in any musical work for any person to make—I will read it shortly—records or other contrivances by means of which the work may be mechanically performed. It is not disputed that if it had been wished to

reproduce the work arranged for the pianoforte, as published, no further manuscript and no further composition would have been necessary in order that it might be performed. There was the published work, and it was only necessary to let the music be played on the pianoforte as published, and a record of the sound could have been obtained. I mention that because it is suggested that, unless the record manufacturers could do what they have done in this case, the provisions of the statute would be nugatory. The answer is that to reproduce the work as published, to reproduce the identical copyright work by contrivances by means of which the work might be mechanically performed, it was not necessary to have any further manuscript. Now consider the position at the time when the various band parts had been composed and written out and nothing further had been done. What justification was there for the defendants doing that? Whose rights, if any, had they thereby infringed? In my opinion at that moment they had infringed the rights of the owner of the copyright, that is to say, the plaintiffs'—not the mechanical rights. What they had done was in substance to make a fresh musical composition, because the full score may well be and has been held capable of being an independent and fresh musical composition, in a proper case carrying with it a fresh copyright as a fresh musical composition. What right had they to do that? In my judgment when they did that they infringed the rights of the plaintiffs. At that moment it had nothing to do with the mechanical rights. They had taken the plaintiffs' pianoforte arrangement, a copyright composition, and had composed the full score for an orchestra and had embodied that in a musical writing. The subsequent use to which they put that did not justify what they had done, nor in my opinion was it necessary in order to reproduce the plaintiffs' work mechanically that that should have been done, although, no doubt, as they urged, it probably was necessary if they wished to produce the full orchestral accompaniment.

For these reasons I am of opinion that the plaintiffs are right in the action.

Then with regard to the relief, the power of the Court clearly

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extends to ordering to be delivered up for destruction all articles created in violation of the plaintiffs' rights. The order for delivery up for destruction is not based upon any notion that the property has passed to the plaintiffs. Whether the property has passed to the plaintiffs or not, the articles may be ordered to be delivered up for destruction, because they are articles manufactured in violation of the plaintiffs' rights, and there is general jurisdiction in the Court to order such articles to be destroyed. In *Hole* v. *Bradbury* (1) it was put in that way by Fry J. It is a case which has very often been followed. He says: "There remains this question, Whether there is any authority in the Court, independently of the statute, to cause to be delivered up any copies which may have been printed, even to a person who is not the registered proprietor at the time they were printed, simply from the general jurisdiction of the Court to order delivery up for destruction of all articles which have been created in violation of the plaintiffs' rights. It appears to me that there is distinct authority in favour of that view." And then he refers to *Prince Albert* v. *Strange* (2) and *Kelly* v. *Hodac* (3) before James V.-C. So that there is full jurisdiction in the Court to order not only the records but the matrix to be delivered up for destruction.

Lord Cozens-Hardy M.R. The appeal will be dismissed with costs.

Solicitors: *Pollock & Co.; Withers, Bensons, Birkett & Davies.*

(1) 12 Ch. D. 886, 903. (2) (1848) 2 De G. & Sm. 652.
(3) (1870) Seton, 4th ed. vol. i. p. 244.

H. C. R.

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[1913 B. 4260.]

Revenue—Licensed Premises—Increase of Duty—Lease—Liability of Grantor of Lease to pay Proportion of Increase—"Grantor of Lease"—Person in receipt of Rents—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 46—*Finance Act*, 1912 (2 *& 3 Geo.* 5, *c.* 8), *s.* 2.

Sect. 2 of the Finance Act, 1912, provides that where licensed premises are held under a lease made before the passing of the Finance (1909-10) Act, 1910, which does not contain any covenant by the lessee to obtain a supply of intoxicating liquor from "the grantor of the lease" the lessee shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from, or deduct from any sum due to, "the grantor of such lease" a proportion of any increase of duty payable in respect of the licence under the Finance (1909-10) Act, 1910:—

Held, affirming the decision of Warrington J. ante, p. 283, that the words "grantor of the lease" must be read in their strict sense as meaning the original grantor of the lease and do not include a person who was for the time being in receipt of the rent of the demised premises.

Appeal from a decision of Warrington J. (1)

By an indenture of lease dated May 11, 1892, and made between Joseph Brown Martin and the plaintiff company in consideration of a premium of 2000*l.*, as to 1000*l.* paid by the plaintiff company on the execution of the lease and as to 1000*l.* covenanted to be paid by the plaintiff company on May 11, 1893, Martin demised to the plaintiff company certain licensed premises being the whole of the basement and part of the ground floor of Nos. 2 and 3, Bedford Street, Strand, in the county of Middlesex, for a term of ninety-nine years from September 29, 1891, at the yearly rent of 900*l.*, the plaintiff company paying rates and taxes. The lease did not contain or import any covenant, agreement, or undertaking on the part of the lessees to obtain a supply of intoxicating liquor from the lessor.

The plaintiff company duly paid the second sum of 1000*l.* so covenanted to be paid by them.

(1) Ante, p. 283.

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The plaintiff company alleged that the reversion in the premises expectant upon the term of ninety-nine years was at all material times and was now vested in the defendant, who was at all material times in receipt from the plaintiff company of the rent reserved by the lease.

The annual duty payable in respect of the licence for the demised premises prior to the Finance (1909-10) Act, 1910, was 51*l.* 8*s.* 6*d.* The annual duty payable since that Act was 278*l.* 11*s.* 5*d.* The increase of the duty under the Act amounted to 227*l.* 2*s.* 11*d.*

The plaintiff company had paid the duty of 278*l.* 11*s.* 5*d.* for the year ending September 30, 1913.

The plaintiff company alleged that the full rental value of the demised premises if the same were unlicensed would be less than the sum of 900*l.* per annum, and claimed in this action a declaration that by virtue of s. 2 of the Finance Act, 1912 (1),

(1) Finance Act, 1912 (2 & 3 Geo. 5, c. 8), s. 2: "Where the licensed premises are held under a lease or agreement for lease made before the passing of the Finance (1909-10) Act, 1910, which does not contain or import any covenant, agreement, or undertaking on the part of the lessee under such lease or agreement for lease to obtain a supply of intoxicating liquor from the grantor of the lease or agreement for lease, the lessee under such lease or agreement for lease shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from, or deduct from any sum due to, the grantor of such lease or agreement for lease so much of any increase of duty payable in respect of the licence under the provisions of the Finance (1909-10) Act, 1910, as may be agreed upon as proportionate to any increased rent or premium payable in respect of the premises being let as licensed premises, and, in default of agreement, the amount proportionate to such increased rent or premium shall be determined in manner directed by rules of Court by a county court in England or Ireland, and by a sheriff court in Scotland.

"The words 'lease,' 'leased,' 'agreement for lease,' and 'lessee' in this section include sub-lease, sub-leased, agreement for sub-lease, and sub-lessee, respectively."

Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. '46: "Where the licence holder is bound by any covenant, agreement, or undertaking, or is otherwise under any direct or indirect obligation of any kind to obtain a supply of intoxicating liquor from any person or persons, the licence holder shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from or deduct from any sum due to any such person so much of any increase of the duty payable in respect of his licence occasioned by this Act as may be agreed upon,

they were entitled to recover as a debt due from or to deduct from any sum due to the defendant so much of the increase of the duty payable in respect of the licence under the provisions of the Finance (1909-10) Act, 1910, as was proportionate to the increased rent and premium payable in respect of demised premises being let as licensed premises, or alternatively so much of the increase of duty as was proportionate to such increased rent.

The defendant by his defence denied that he was the grantor of the lease and alleged that the plaintiff company were not the holders of the licence.

At the trial before Warrington J. on May 7, 1914, the plaintiff company proved that from the year 1896 the rent of the premises had been demanded by and paid to the defendant.

The licence of the premises was in the name of D. H. Beardon, the secretary of the plaintiff company, who held it as their nominee.

The position of the lessor's title was stated by Warrington J. as follows : " On December 5, 1892, Martin informed the plaintiff company that his interest in the premises was then vested in one Kirk, and as a matter of fact the second of the two instalments of the premium was, on May 5, 1893, paid by the plaintiff company to Kirk. The facts with regard to that have been admitted and they are these : In December, 1892, Martin sold the freehold of the premises to certain persons who may be conveniently described as Brymer's trustees, and they contemporaneously with the sale to them granted to Kirk a lease of the whole of the same premises for ninety-nine years from September 29, 1892, subject to the plaintiff company's lease and to certain other leases of other portions of the premises which had then already been granted. On April 9, 1896, Kirk assigned his lease to the defendant subject to certain mortgages which he

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or in default of agreement determined by the Commissioners to be proportionate to any increased rent of the licensed premises, or increased prices of intoxicating liquor supplied, or other benefit obtained by such person by reason of any such covenant, agreement, undertaking, or obligation as aforesaid."

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had created in the meanwhile, whether by assignment or sub-demise appears to be uncertain, but that fact is immaterial. The defendant has been in the receipt of the rents and profits of these premises by virtue of the assignment to him of Kirk's lease. The legal position therefore is this : At law the reversion immediately expectant on the determination of the plaintiff company's lease is vested in Kirk's mortgagees whether they take by assignment or sub-demise ; but the mortgagees are not in possession, and the defendant, as is often the case, although his estate is merely one in equity, is in receipt of the rents as the owner in equity, or, as he is sometimes called, the owner of the equity of redemption of Kirk's lease. The fee simple of the reversion is vested in Brymer's trustees or those claiming under them. Whether they have made any further grant of it I do not know."

Warrington J. held that the words " grantor of the lease " must be read in their strict sense as meaning the original grantor of the lease, and dismissed the action.

The plaintiffs appealed.

Clauson, K.C., and *Harold Burrows*, for the appellants. Warrington J. has held that we have no right of action against Read and that the only possible defendant is Martin, who actually granted the lease. But we do not know what has become of Martin and it is clear that he no longer has any interest in the premises. It cannot have been intended that the liability to contribute towards payment of increased duty should continue indefinitely to hang over an owner in fee of a licensed house who has let it on lease without a tie. " Grantor of the lease " must mean the owner of the reversion, the man who receives the rent from the lessee. The actual grantor might have been a trustee or a tenant for life and could not be subject to such a liability. Sect. 2 of the Finance Act, 1912, not only provides for deducting the amount from the rent, but also makes the grantor personally liable as for a debt. The intention must have been that this liability should fall upon the person who takes the rent; and this construction will work much less injustice than that adopted by the learned judge.

Watney, Combe Reid & Co. v. *Berners* (1) was referred to in the Court below, but it has no bearing on this point.

Gordon Hewart, K.C., and *C. Zeffertt*, for the respondent, were not called upon to argue.

LORD COZENS-HARDY M.R. In 1892 a lease was granted of a free house by one Martin to the plaintiff company. Eighteen years after the lease was granted, Parliament thought fit to impose an extra duty on licensed houses. No provision whatever was made in that Act of 1910 for throwing upon anybody else the amount of the increased tax imposed by that Act of 1910 in the case of a free house. Two years afterwards, in 1912 (that is, twenty years after the granting of this lease), Parliament was minded to give relief in the case of free houses; not by any means the same as in the case of tied houses, but different in rather material respects; and the only question here is whether in the case of this free house the Bodega Company, as the lessees, can claim against the person who is now the reversioner and receives the rent, and recover from him under the provisions of s. 2 of the Act of 1912. Unless the plaintiffs can come within this section, of course they have no right of indemnity or recourse against the defendant. Relief is given against the grantor of the lease. Who is the grantor of the lease? Undoubtedly Martin. It is quite plain that Read is not the grantor of the lease. He is, by reason of a series of devolutions of title, the immediate reversioner on the lease; he being himself a lessee. It has been pointed out to us with great force that it is a very odd provision to give the remedy only against the grantor of the lease, and that it might have been reasonably given to the reversioner for the time being. The answer is that it has not, and we are asked to put a wholly unnatural meaning on the words "grantor of the lease," for which there is no justification. I can quite understand that that view might have been reasonable, but as the clause stands, I think the decision of Warrington J. was absolutely right, and that this appeal must be dismissed with costs.

(1) [1913] 3 K. B. 427; [1914] 3 K. B. 288.

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KENNEDY L.J. I am clearly of the same opinion. It is sought to enforce against Mr. Read a claim under the Finance Act, 1912, s. 2. It is sought to enforce it against him as being "the grantor of such lease or agreement for lease"—those are the words of the section. In this case it is a lease. In fact, he was not the grantor of the lease; therefore it seems to me the claim fails. It is said, although he was not the grantor, he ought to be treated as the grantor, because it would be exceedingly inconvenient and rather troublesome to find out, if he is not the grantor, against whom the plaintiffs are to proceed. That is a question which may make it not illegitimate, possibly, to criticize the Act of Parliament, but it does not enable us to hold an action maintainable against Read, who does not occupy the only position which would make him liable under the section.

SWINFEN EADY L.J. I am of the same opinion. It will be observed that under the statute the right is given, not merely to deduct the amount in question from any sum due to the grantor, but also to recover as a debt due from the grantor the amount in question. Now who is the grantor? Obviously the person who granted the lease; but is there any other grantor? It is suggested that it means the reversioner for the time being. There are no words in the statute to convey that meaning. There is no interpretation clause. It is said that the defendant, Read, is now the reversioner, but it does not appear to be clear at all. The title is this: Martin was the freeholder, and he granted a lease; then there was a conveyance of the freehold to Brymer's trustees, and a lease granted to Kirk for ninety-nine years from September 29, 1892, the original lease being for ninety-nine years from September 29, 1891. Now, what were Kirk's dealings with the property? The statement is to be found in Warrington J.'s judgment that Kirk assigned his lease to the defendant, Read, subject to certain mortgages which he had created in the meanwhile; whether by assignment or sub-demise appears to be uncertain. So that it may be that under these mortgages made by Kirk his term is now vested in one of the mortgagees, and that in these mortgagees is vested the legal reversion immediately expectant upon the plaintiffs' term. It

was only subject to the mortgages that the assignment was made to Read. It is quite impossible to expand the word "grantor" in the way that the appellants ask us to do. There is nothing in the statute to justify it, and it might lead to the greatest injustice. The owner of the equity of redemption might receive the rent from the tenant, the tenant not having made any deduction. Then the owner of the equity of redemption not having kept down the interest on the mortgage, perhaps, the second mortgagee enters, and the inn holder says, "Now, you having entered, and given notice that you take possession, I can sue you; it is immaterial that you have received no rent; you are a grantor, I can sue you for a proportion of the increase of duty." Having recovered judgment against him, the first mortgagee may then take possession. In cases of that sort, where from time to time there are changes in the person who for the time being is entitled to the actual possession, no provision is made in the statute for dealing with the liability. Then another matter is that there is no provision made in the statute for an apportionment of the liability, that is to say, there is no limit to the quantum of the return to be recovered from any grantor. It does not say that it shall be any increase payable say—in the last six months, twelve months, or two years; there is no limit of time, but the holder may recover it from the grantor. Supposing he has paid the rent in full and has not made any deduction, from whom is he to claim? There may have been transfers from time to time of the property. It is quite too vague and indefinite; there are too many chances and changes with regard to the incidence of this liability to justify the Court in endeavouring to expand the term "grantor" so as to meet all those possible cases. In my opinion the appeal fails.

Appeal dismissed.

Solicitors: *Treherne, Higgins & Co.; Zeffertt & Co.*

H. C. R.

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An executor who as co-trustee of a settlement with his testator was party to a breach of trust which he has not made good cannot exercise on behalf of his cestuis que trust a right of retainer out of the testator's estate in respect of that breach of trust; but another executor, being also a trustee of the settlement but no party to the breach of trust, can do so, even though he

ADMINISTRATION—*continued.*

was not appointed a trustee until after the death of the testator.

In re Barrett (1889) 43 Ch. D. 70 followed.

Notwithstanding the earlier decisions in Courts of first instance to the contrary, the result of the Administration of Estates Act (Hinde Palmer's Act), 1869, is to enlarge an executor's right of retainer in respect of a simple contract debt so as to enable him to exercise it as against specialty creditors as well as against simple contract creditors.

The principle of the decision of the Court of Appeal in *In re Samson* [1906] 2 Ch. 584; the opinion of Neville J. in *In re Jennes* (1909) 53 Sol. J. 376; and the decision of the Irish Courts in *Olpherts* v. *Coryton* [1913] 1 I. R. 211 followed.

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2. —— *Letters of Administration—Grant of —Sale of Real Estate by Administratrix—Subsequent Discovery of Will appointing Executors —Revocation of Letters of Administration—Grant of Probate to Executors—Validity of Purchaser's Title—Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *ss.* 75, 77, 78—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 70—*Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *ss.* 1, 2, 11, 24.

Letters of administration were granted to the widow of a man who was erroneously presumed to have died intestate. The administratrix as personal representative of the deceased, by virtue of the Land Transfer Act, 1897, sold and conveyed to a purchaser a portion of the deceased's real estate. Upon the subsequent discovery of a will the executors thereby appointed obtained a recall of the letters of administration and a grant of probate to themselves. In an action by the executors to recover possession of the real estate sold by the administratrix:—

Held, reversing the decision of Astbury J.

ADMINISTRATION—*continued.*

[1913] 2 Ch. 384, that the grant of administration was not void ab inito and that the purchaser had acquired a good title.

Held, also, that even if the grant of administration had been void for want of jurisdiction it was an order of the Court by virtue of which the purchaser's title would have been protected under s. 70 of the Conveyancing and Law of Property Act, 1881.

Graysbrook v. *Fox* (1565) 1 Plowd. 275; *Abram* v. *Cunningham* (1677) 2 Lev. 182; and *Ellis* v. *Ellis* [1905] 1 Ch. 613 overruled. HEWSON *v.* SHELLEY – – – **C. A. 13**

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The donee of a general testamentary power of appointment over a fund of 15,000*l.* was adjudicated bankrupt in January, 1890, and a small dividend was paid. Early in 1892 the donee was again adjudicated bankrupt, but no dividend was paid, The donee never obtained his discharge in either bankruptcy, and died in July, 1911, having by his will duly exercised his power of appointment. In an action for the administration of his estate, which consisted almost entirely of the appointed fund, the creditors in the bankruptcies claimed to be paid the balance still remaining unsatisfied of their respective debts:—

Held by Warrington J., following his own decision of *In re Guedalla* [1905] 2 Ch. 331, that the creditors in the bankruptcies were precluded by the effect of s. 9 of the Bankruptcy Act, 1883, from claiming against the appointed fund and that their claims must be disallowed.

Held by the Court of Appeal (without expressing any opinion upon the grounds of the decision in the Court below), that although the appointment and death gave creditors a new fund from which to get payment and a new mode of proceeding in order to get it, yet that was merely a new remedy and not a new cause of action, the cause being really the old debt; that the Statute of Limitations having begun to run against the appellants before the commencement of the bankruptcy, continued to run notwithstanding the bankruptcy; and that the claims of the appellants, not being claims in the bankruptcy, were barred by lapse of time. *In re* BENZON. BOWER *v.* CHETWYND – **C. A. 68**

2. —— *Mutual Dealings—Set-off—Insolvent Company — Winding-up — Secured Creditor — Mortgage of Chattels—Insurance in Creditor's Name—Receipt of Insurance Money before Winding-up — Surplus over Secured Debt — Set-off against Unsecured Debt—Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 38—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 207.

Company A. had considerable mutual business dealings with company B. in the course of which dealings it borrowed money from company B. on

BANKRUPTCY—*continued.*

two bills of sale charging certain machinery and providing for its insurance against fire.

The machinery was insured in the name of company B., the premiums being charged to company A.

The machinery was destroyed by fire, and company B. received 1600*l.* insurance money.

About a fortnight later company A. was wound up voluntarily and was found to be insolvent.

At the date of the winding-up 744*l.* remained due on the bills of sale, so that company B. had a surplus of 856*l.* insurance money in hand for company A. after deducting the secured debt.

On the other hand company A. owed company B. 2099*l.* unsecured book debts :—

Held, that as the mutual dealings had resulted in cross money claims "before" winding-up company B. was entitled to set off the 856*l.* surplus insurance money against the 2099*l.* book debts under the Bankruptcy Act, 1883, s. 38 (the "mutual dealings" section), which applies to insolvent companies under the Companies (Consolidation) Act, 1908, s. 207.

Principles stated in *Eberle's Hotels Co.* v. *Jonas* (1887) 18 Q. B. D. 459, 465, applied.

Talbot v. *Frere* (1878) 9 Ch. D. 568 and *In re Gregson* (1887) 36 Ch. D. 223 (cases under the old statutes of set-off), and *In re Gedney* [1908] 1 Ch. 804 (a case under s. 38), in which case the claim to a set-off failed for want of mutuality, and *In re Pollitt* [1893] 1 Q. B. 455, *In re Mid-Kent Fruit Factory* [1896] 1 Ch. 567, and *Ex parte Caldicott* (1884) 25 Ch. D. 716, in which cases s. 38 was impliedly excluded by special contract therein, distinguished. *In re* H. E. THORNE & SON, LIMITED **Astbury J. 438**

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—— *Lewis* v. *Templer* – (1864) 33 Beav. 625
Distinguished. *In re* FIRTH. LOVERIDGE *v.* FIRTH – **[1914] 2 Ch. 386**

—— *Lloyd and North London Railway* (*City Branch*) *Act*, 1861, *In re* [1896] 2 Ch. 397.
Approved. *In re* GRIGGS. *Ex parte* SCHOOL BOARD FOR LONDON **[1914] 2 Ch. 547**

—— *London Steam Dyeing Co.* v. *Digby* (1885) 36 W. R. 497.
Not followed. J. T. SMITH AND J. E. JONES, LIMITED *v.* SERVICE, REEVE & Co. – – – **[1914] 2 Ch. 576**

—— *Manchester Ship Canal Company* v. *Horlock* [1914] 1 Ch. 453.
Reversed – – **[1914] 2 Ch. 199**

CASES—*continued.*

—— *Marriott* v. *Chamberlain* (1886) 17 Q. B. D. 154.
Applicable. OSRAM LAMP WORKS, LIMITED *v.* GABRIEL LAMP COMPANY [1914] 2 Ch. 129

—— *Metropolitan Water Board* v. *Avery* [1914] A. C. 118.
Distinguished. ODDENINO *v.* METROPOLITAN WATER BOARD [1914] 2 Ch. 734

—— *Mid-Kent Fruit Factory, In re* [1896] 1 Ch. 567.
Distinguished. *In re* H. E. THORNE & SON, LIMITED – [1914] 2 Ch. 438

—— *Millbourn* v. *Lyons* – [1914] 1 Ch. 34
Affirmed – – [1914] 2 Ch. 231

—— *Nash* v. *Layton* – – [1911] 2 Ch. 71
Applicable. OSRAM LAMP WORKS, LIMITED *v.* GABRIEL LAMP COMPANY [1914] 2 Ch. 129

—— *North-West Transportation Co.* v. *Beatty* (1887) 12 App. Cas. 589.
Discussed and applied. TRANSVAAL LANDS COMPANY *v.* NEW BELGIUM (TRANSVAAL) LAND AND DEVELOPMENT COMPANY – [1914] 2 Ch. 488

—— *Olpherts* v. *Coryton* – [1913] 1 I. R. 211
The decision of the Irish Courts in, followed. *In re* HARRIS. DAVIS *v.* HARRIS – – [1914] 2 Ch. 395

—— *Osram Lamp Works, Limited* v. *Gabriel Lamp Company* [1914] 1 Ch. 699.
Reversed – – [1914] 2 Ch. 129

—— *Pearce* v. *Edmeades* (1838) 3 Y. & C. Ex. 246.
Followed and applied. *In re* TATE. WILLIAMSON *v.* GILPIN [1914] 2 Ch. 182
Distinguished. *In re* FIRTH. LOVERIDGE *v.* FIRTH – [1914] 2 Ch. 386

—— *Perkins, In re* – – [1893] 1 Ch. 283
Distinguished. *In re* HOLLAND. HOLLAND *v.* CLAPTON [1914] 2 Ch. 595

—— *Pettey* v. *Parsons* – [1914] 1 Ch. 704
Reversed – – – [1914] 2 Ch. 653

—— *Pimm, In re* – – [1904] 2 Ch. 345
Applied. *In re* BRIGGS. RICHARDSON *v.* BANTOFT – [1914] 2 Ch. 413

—— *Pollitt, In re* – – [1893] 1 Q. B. 455
Distinguished. *In re* H. E. THORNE & SON, LIMITED – [1914] 2 Ch. 438

—— *Poyser, In re* – – – [1908] 1 Ch. 828
Followed. *In re* FORSTER-BROWN. BARRY *v.* FORSTER-BROWN [1914] 2 Ch. 584

—— *Rees, In re* – – (1881) 17 Ch. D. 701
Referred to. *In re* FORSTER-BROWN. BARRY *v.* FORSTER-BROWN [1914] 2 Ch. 584

CASES—*continued.*

—— *Richardson, In re* – [1911] 2 K. B. 705
Discussed. *In re* LAW GUARANTEE TRUST AND ACCIDENT SOCIETY, LIMITED. LIVERPOOL MORTGAGE INSURANCE COMPANY'S CASE [1914] 2 Ch. 617

—— *Richerson, In re* (No. 2) [1893] 3 Ch. 146
Followed and applied. *In re* TATE. WILLIAMSON *v.* GILPIN [1914] 2 Ch. 182

—— *Royal Warrant Holders Association* v. *Kitson* (1909) 26 Rep. Pat. Cas. 157.
Followed. J. T. SMITH AND J. E. JONES, LIMITED *v.* SERVICE, REEVE & Co. – – – [1914] 2 Ch. 576

—— *Samson, In re* – – [1906] 2 Ch. 584
The principle of the decision of the Court of Appeal in, followed. *In re* HARRIS. DAVIS *v.* HARRIS [1914] 2 Ch. 395

—— *Slazenger* v. *Pigott* (1895) 12 Rep. Pat. Cas. 439.
Not followed. J. T. SMITH AND J. E. JONES, LIMITED *v.* SERVICE, REEVE & Co. – – – [1914] 2 Ch. 576

—— *Spalding (A. G.)* v. *A. W. Gamage, Limited* [1914] W. N. 86.
As to costs see A. G. SPALDING *v.* A. W. GAMAGE, LIMITED – [1914] 2 Ch. 405

—— *Spencer* v. *Bullock* (1795) 2 Ves. Jun. 687
Distinguished. *In re* FIRTH. LOVERIDGE *v.* FIRTH – [1914] 2 Ch. 386

—— *Staffordshire Gas and Coke Co., In re* (1892) 66 L. T. 413.
Overruled. CHANNEL COLLIERIES TRUST, LIMITED *v.* DOVER, ST. MARGARET'S AND MARTIN MILL LIGHT RAILWAY COMPANY – [1914] 2 Ch. 506

—— *Sturges* v. *Bridgman* (1879) 11 Ch. D. 852
Distinguished. WOOD *v.* CONWAY CORPORATION – – [1914] 2 Ch. 47

—— *Talbot* v. *Frere* – (1878) 9 Ch. D. 568
Distinguished. *In re* H. E. THORNE & SON, LIMITED – [1914] 2 Ch. 438

—— *Taylor* v. *Grange* (1880) 15 Ch. D. 165, 168
Principle stated by Cotton L.J. in, applied. DODD *v.* CATTELL [1914] 2 Ch. 1

—— *Templeman* v. *Warrington* (1842) 13 Sim. 267.
The reasoning in, adopted. *In re* FIRTH. LOVERIDGE *v.* FIRTH [1914] 2 Ch. 386

—— *Thomas, In re* – – [1891] 3 Ch. 482
Followed. *In re* GODFREE. GODFREE *v.* GODFREE – [1914] 2 Ch. 110

—— *Thomas* v. *Dey* – (1908) 24 Times L. R. 272
Not followed. KEEN *v.* PRICE [1914] 2 Ch. 98

CASES—*continued.*

—— *Thwaites* v. *Coulthwaite* – [1896] 1 Ch. 496
The decision of Chitty J. in, although correct on the general law, cannot be regarded as a decision on s. 1 of the Gaming Act, 1892. KEEN *v.* PRICE [1914] **2 Ch. 98**

—— *Tulk* v. *Moxhay* – – (1848) 2 Ph. 774
Referred to. SMITH *v.* COLBOURNE [1914] **2 Ch. 538**

—— *Vine* v. *Raleigh* – – [1896] 1 Ch. 37
Followed. *In re* JOHNSON. JOHNSON *v.* JOHNSON – – [1914] **2 Ch. 134**

—— *Whittington Gas Light and Coke Co.* v. *Chesterfield Gas and Water Board* [1914] 1 Ch. 270.
Affirmed – – [1914] **2 Ch. 146**

—— *Williams, In re; Metcalf* v. *Williams* [1914] 1 Ch. 219.
Affirmed – – [1914] **2 Ch. 61**

—— *Wilson* v. *Coxwell* – (1883) 23 Ch. D. 764
Not followed. *In re* HARRIS. DAVIS *v.* HARRIS – – [1914] **2 Ch. 395**

CHARITY—*Hospital*—"*Wholly maintained by voluntary contributions*"—*Founder's Deed of Gift*—*One Original Contribution*—*Power to apply Capital or Income for General Purposes of Charity*—*Jurisdiction of Charity Commissioners*—*Exemption*—*Charitable Trusts Act*, 1853 (16 *&* 17 *Vict. c.* 137), *ss.* 9, 10, 62, 66.

A deed of gift of real and personal property to trustees for the purpose of founding a hospital provided for the realization of the property and application of the capital and income of the proceeds for the general purposes of the charity and, in particular, for the erection and equipment of a hospital to the extent of 10,000*l.* Part of the property had been realized and the hospital had been erected and was in the course of being furnished and equipped. A subscription list had not yet been opened, and the charity was being maintained solely by the proceeds of sale and income of the property originally contributed for its foundation. The trustees of the charity claimed exemption from the jurisdiction of the Charity Commissioners on the ground that the hospital was a charity "wholly maintained by voluntary contributions":—

Held, that in the existing circumstances the hospital was not an "institution, establishment, or society for . . . . charitable purposes wholly maintained by voluntary contributions" within the meaning of that expression in s. 62 of the Charitable Trusts Act, 1853, so as to exempt it at present from the jurisdiction or control of the Charity Commissioners or the powers and provisions of the Act. *In re* RICHARD MURRAY HOSPITAL – – – – **Joyce J. 713**

2. —— *Incorporation by Royal Charter in* 1739—*Voluntary Contributions*—*Investment in Land*—*Gift of Land without Expression of Trust*—"*Endowment*"—*Charity* "*maintained partly by voluntary subscriptions and partly by income arising from endowment*"—*Power of Disposition*—*Exemption from* "*jurisdiction or control of the said board or the powers or provisions*" *of the Act*—*Charitable Trusts Act*, 1853 (16 *&* 17 *Vict. c.* 137), *ss.* 62, 66—*Charitable Trusts Amendment Act*, 1855 (18 *&* 19 *Vict. c.* 124), *ss.* 29, 48.

The charity, commonly called the Foundling Hospital, was incorporated in 1739 by Royal Charter with power to purchase, hold, sell, demise, and dispose of land of any tenure. In the same year the charter was confirmed by Act of Parliament. In 1750 the governors of the charity purchased land in Bloomsbury which was conveyed to them without the expression of any trust. The purchase price was paid out of moneys in the hands of the governors representing voluntary contributions, in obtaining which there had undoubtedly been some idea that the governors should not immediately spend all they received but should make investments, as and when possible and expedient, in property producing income for the maintenance of the charity, but nevertheless the contributions so obtained were such that they might have been expended as income, or in whatever manner the governors pleased for the purposes of the charity. On part of this land the Foundling Hospital was subsequently built, the chapel being the subject of a special subscription, and the rest of the land was developed under long building leases.

The yearly rentals received from the Bloomsbury estate at the present time were very considerable, but for some time past the yearly subscriptions, irrespective of donations and benefactions, had only averaged eleven guineas.

In 1744 certain property in the city of London had been conveyed by the donors to the governors of the hospital without the expression of any trust.

In an action by the Attorney-General for a declaration that the governors of the hospital could not deal with the Bloomsbury estate or City property except in accordance with the provisions of s. 29 of the Charitable Trusts Amendment Act, 1855:—

Held, that, upon the evidence, the charity was at the time of the passing of the Charitable Trusts Act, 1853, and had ever since been supported in part—though possibly to a comparatively small extent—by voluntary subscriptions and, consequently, was a charity "maintained partly by subscriptions and partly by income arising from endowment" to which the exemption in respect of donations and bequests contained in the latter part of s. 62 of that Act applied; that, therefore, the charity was, by virtue of s. 48 of the Charitable Trusts Amendment Act, 1855, exempted from the operation of s. 29 of the latter Act; and that, in the circumstances, the Bloomsbury estate, whether called endowment or not, was exempt from the jurisdiction or control of the board and from the provisions of the Act of 1855 as well as of the Act of 1853.

Held, further, following *In re Corporation of the Sons of the Clergy and Skinner* [1893] 1 Ch. 178, that there was no material difference in point of law between the position of the City property and the Bloomsbury estate.

In re Church Army (1906) 94 L. T. 559; 75 L. J. (Ch.) 467 applied. ATTORNEY-GENERAL *v.* FOUNDLING HOSPITAL – – **Joyce J. 154**

CHARITY—*continued.*

—— Charitable trust—Gift for contribution to workpeople's holiday—Gift to club—Purposes to be determined by committee—Validity – – – – – **90**
See WILL. 2.

—— Will — Legacy to "Saint Mary's Home for Women and Children of 15 Wellington Street Chelsea"—Change in controlling body and change of site in lifetime of testatrix—Continuity of home—Good charitable bequest for a definite charitable object—No lapse
See WILL. 6. **245**

CHARITY COMMISSIONERS.
See under CHARITY.

CHESTERFIELD GAS AND WATER BOARD ACT, 1895 – – – – **146**
See COMPANY. 4.

CHILDREN—Gift of income to children during their lives or to issue of any dying before the others—Gift over after death of all children to grandchildren—Implication of cross-remainders during life of survivor—Will—Construction – – **182**
See WILL. 4.

CHURCH.
See under ECCLESIASTICAL LAW.

CHURCHWARDENS—Right to sue—Practice—One of two churchwardens – – **308**
See ECCLESIASTICAL LAW.

CLASS—Will—Construction—Gift in remainder to children as a class, but the whole to one child if there should be only one child living—Survival of more than one child—Reflecting contingency – **386**
See WILL. 3.

CODICIL — Will — Codicil confirming will — Legacy — Ademption — Particular purpose—Bequest for purchase of land for benefit of parish church—Subsequent purchase and gift of land for like purpose—Both gifts in memory of testator's wife – – – – – – **422**
See WILL. 1.

COMPANY — *Directors — Casual Vacancy — Election by Sole Remaining Director—Qualification—Appointment of Unqualified Persons—Irregular Allotment—Validation of Irregular Acts — Companies Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 16), *ss.* 14—17, 81, 85, 89, 90, 92, 99.

The defendant company was incorporated by an Order, confirmed by the Board of Trade, under the Light Railways Act, 1896. This Order incorporated the provisions of the Companies Clauses Consolidation Act, 1845, and provided, inter alia, that the number of directors should be five, but that the company might vary the number if it was not less than three nor more than seven; that the qualification of a director should be not less than 250*l.* in the share capital; that the quorum at a directors' meeting should be three, but that if the number was reduced to three the quorum should be two; and

COMPANY—*continued.*

that P., J., and C., and two other persons nominated by them, should be the first directors. P., J., and C. never nominated any other directors, but allotted to each of themselves his qualifying shares, and one share each to four other persons. At the first ordinary meeting the number of directors was reduced to three, and P., J., and C. were continued in office. P. and C. afterwards transferred their qualification shares to the plaintiff company, and thereby ceased to be directors. J. subsequently appointed X. and Y. to be directors. At the time of their appointment neither of them held the necessary qualification shares, but at the same meeting J., X., and Y. (acting in the bona fide belief that the appointment of X. and Y., subject to their at once acquiring their qualification shares, was good) purported to allot such shares to them. In an action by the plaintiff company against the railway company and J., X., and Y.:—

Held by the Court of Appeal, affirming the decision of Sargant J. [1914] 1 Ch. 568, that although the power to elect directors in the case of casual vacancies was by s. 89 of the Act of 1845 given to "the remaining directors," it was unnecessary to the exercise of that power that there should be in office the number of directors prescribed by the Order, and therefore that J. had power to elect new directors; that the holding of the required qualification shares was a condition precedent to the election of a director, and therefore that X. and Y. had not been duly appointed and could not act as directors; but that the irregular allotment by J., X., and Y. of the qualification shares to X. and Y. was an act done by de facto directors, which was validated by s. 99 of the same Act, the test being whether the directors in making the allotment had acted bona fide, which was not disputed in this case.

Provisions like s. 99 are to be construed broadly as between companies and their members as well as between companies and outsiders.

Dawson v. *African Consolidated Land and Trading Co.* [1898] 1 Ch. 6 and *British Asbestos Co.* v. *Boyd* [1903] 2 Ch. 439 followed.

In re Staffordshire Gas and Coke Co. (1892) 66 L. T. 413 overruled. CHANNEL COLLIERIES TRUST, LIMITED *v.* DOVER, ST. MARGARET'S AND MARTIN MILL LIGHT RAILWAY COMPANY – – – – – – **C. A. 506**

2. —— *Directors—Fiduciary Position—Contract with another Company in which a Director holds Shares—Shares held as Trustee for Third Persons—Notice of Irregularity—Rescission.*

Unless and so far only as authorized by a company's articles, the board cannot make a binding contract with any other company in which a member of the quorum holds shares.

This rule applies whether the shares are held in trust or beneficially.

If the second company has notice of the irregularity, the first company may obtain rescission of the transaction even after completion, provided that rescission is still possible.

So *held* by the Court of Appeal, affirming the decision of Astbury J.

Ex parte Bennett (1805) 10 Ves. 381;

COMPANY—*continued.*

Aberdeen Ry. Co. v. *Blaikie* (1854) 1 Macq. 461; *Imperial Mercantile Credit Association* v. *Coleman* (1871) L. R. 6 Ch. 558; (1873) L. R. 6 H. L. 189; *North-West Transportation Co.* v. *Beatty* (1887) 12 App. Cas. 589; and *Costa Rica Ry. Co.* v. *Forwood* [1900] 1 Ch. 756; [1901] 1 Ch. 746, discussed and applied. TRANSVAAL LANDS COMPANY *v.* NEW BELGIUM (TRANSVAAL) LAND AND DEVELOPMENT COMPANY C. A. 488

3. —— *Indemnity to Servants — Special Article—Common Law Right—Mining Engineer —Scope of Employment—Libel and Slander—Costs of successfully defending Action.*

The company was registered in 1902 for the purpose of acquiring from one of the promoters, who became the chairman and managing director of the company, certain mining properties and options in the Argentine. The applicant was employed under a contract in writing by the company as consulting engineer to visit the Argentine and to make inquiries into the value of these properties and options and report thereon to the company. As the result of his inquiries the applicant reported that the managing director had made contracts for worthless properties, had made misleading reports, and had arranged for certain secret commissions. The managing director brought an action for libel and slander against the applicant, which after being carried to the House of Lords was ultimately dismissed with costs owing to the failure of the managing director to comply with an order for security for the costs of a new trial. The greater part of the applicant's costs proved irrecoverable, and he now sought to prove in the liquidation of the company for the amount of these costs. The liquidator rejected the proof. The applicant was a member of the company at the date of his employment, and article 143 of the company's articles of association provided that every officer or servant of the company should be indemnified by the company against loss, and that it should be the duty of the directors out of the funds of the company to pay all costs, losses, and expenses which he might incur by reason of any act done by him as such officer or servant:—

Held by Sargant J., that on the evidence the reports in question were privileged and were made without malice, but, though it was the duty of the applicant to make the reports to the company, it did not fall within the direct terms of his employment so to do; and that the applicant was not entitled to any indemnity against the costs in question either under article 143, which constituted no contract between the company and the applicant, or under the common law.

The "James Seddon" (1866) L. R. 1 A. & E. 62 distinguished.

Held by the Court of Appeal, that in fact everything the applicant had done was in pursuance of his duties as agent, and under the settled rules of agency he was entitled to indemnity and reimbursement.

Decision of Sargant J. reversed.

In re FAMATINA DEVELOPMENT CORPORATION, LIMITED – – – – C. A. 271

COMPANY—*continued.*

4. —— *Local Government—Injunction—Gas —"Main" or "service pipe" — Extension of Mains—Chesterfield Gas and Water Board Act,* 1895 (58 *&* 59 *Vict. c. cxlvii.*), *s.* 4.

The defendants were incorporated under the Chesterfield Gas and Water Board Act, 1895, for the purpose of acquiring the undertaking of the Chesterfield Waterworks and Gas Light Company, and by s. 4 of that Act the limits for the supply of gas and water were to be the existing limits of the company, and it was provided that it should not be lawful for the defendants to extend the existing mains of the company for the supply of gas in the parishes of B. and W. unless with the previous written consent of the plaintiffs.

In 1912 the defendants, without obtaining such consent, laid a two-inch pipe, eighty-eight yards in length, from one of the mains in their own district along a street in the parish of W. in order to supply gas to one consumer. The plaintiffs, who were a limited company formed to supply gas in the parishes of B. and W., brought their action for an injunction to restrain the defendants from allowing this pipe to remain and from laying any pipes in the said parishes contrary to the proviso in the Act:—

Held (affirming the decision of Eve J. [1914] 1 Ch. 270), that the proviso in the Act of 1895 was limited in its operation to mains properly so called and distinct from service pipes; that the eighty-eight yards length of pipe was laid down and was being used as a service pipe only; and that the plaintiffs were not entitled to an injunction. WHITTINGTON GAS LIGHT AND COKE COMPANY, LIMITED *v.* CHESTERFIELD GAS AND WATER BOARD – – C. A. 146

5. —— *Reconstruction—Sale of Assets to New Company in Consideration of Shares— Rights of Dissenting Members—Right of Executors of Deceased Member to dissent—Construction of Articles of Association—Companies (Consolidation Act,* 1908 (8 *Edw.* 7, *c.* 69), *s.* 192.

Executors of a deceased member of a company who have not had his shares registered in their own names have the same right to dissent from a reconstruction scheme adopted under s. 192 of the Companies (Consolidation) Act, 1908, and to restrain the liquidator from carrying out the scheme without purchasing the shares as the deceased member would have had if living.

Articles of association forbidding executors to exercise the rights of a member until they they have been registered *held* to refer to the exercise of rights on their own behalf and not on behalf of their testator's estate. Decision of Astbury J. affirmed. LLEWELLYN *v.* KASINTOE RUBBER ESTATES, LIMITED – – C. A. 670

6. —— *Reduction of Capital — Consent of Creditors—Evidence—Holders of Bearer Debentures — No List — Trust Deed — Majority Clause—Extraordinary Resolution—Companies (Consolidation) Act,* 1908 (8 *Edw.* 7, . 69), *ss.* 49, 50—*General Order (Reduction of Capital),* 1909, *r.* 17.

The consent of the holders of bearer debentures to a proposed reduction of a company's

COMPANY—*continued.*

capital was evidenced by an extraordinary resolution in that behalf duly passed under a majority clause in the trust deed and binding on all the debenture-holders.

About 87 per cent. in value of the total amount of the debenture debt was represented at the meeting, which was duly convened, and the resolution was passed unanimously.

It was not possible to ascertain the names of all the debenture-holders:—

Held, that in the circumstances the extraordinary resolution was sufficient evidence of the consent of all the debenture-holders within s. 50 of the Companies (Consolidation) Act, 1908, and r. 17 of the General Order (Reduction of Capital), 1909, and that it was not necessary to have a list of the debenture-holders under s. 49. *In re* HYDRAULIC POWER AND SMELTING COMPANY - - - - **Astbury J. 187**

—— Bankruptcy — Mutual dealings—Set-off—Insolvent company — Winding-up — Secured creditor—Mortgage of chattels —Insurance in creditor's name—Receipt of insurance money before winding-up—Surplus over secured debt—Set-off against unsecured debt - **438**
See BANKRUPTCY. 2.

—— Friendly society—Conversion into limited company — Enlargement of objects — Special resolution— Validity — Memorandum of association — "Members" of the company - - - **430**
See FRIENDLY SOCIETY.

—— Insurance of debentures—Re-insurance—Contract of indemnity—Liquidation—Scheme of arrangement — Limit of liability of re-insurer - - - **617**
See INSURANCE (DEBENTURES).

COMPENSATION—Licensing Acts.
See under LICENSING ACTS.

CONDITION—Power of appointment—Exercise —Appointment to object—Condition to pay annuities to persons not objects—Validity of appointment freed from condition - - - - - **595**
See POWER OF APPOINTMENT.

CONTINGENCY—Reflecting contingency—Will —Construction—Gift in remainder to children as a class, but the whole to one child if there should be only one child living — Survival of more than one child - - - - - **386**
See WILL. 3.

CONTRACT — Company — Directors—Fiduciary position—Contract with another company in which a director holds shares —Rescission - - - - **488**
See COMPANY. 2.

—— Contract of indemnity—Insurance of debentures — Re-insurance — Liquidation —Scheme of arrangement — Limit of liability of re-insurer - - **617**
See INSURANCE (DEBENTURES).

CONTRACT—*continued.*

—— Vendor and purchaser.
See under VENDOR AND PURCHASER.

CONVENTUAL CHURCH—Parish church — Appropriation — Rectory — Perpetual curate—Suppression of Priory—Grant from Crown—Sale of bells—Evidence
See ECCLESIASTICAL LAW. **308**

CONVERSION—Friendly society—Conversion into limited company—Memorandum of association—Enlargement of objects —Special resolution—Validity—"Members" of the company - - **430**
See FRIENDLY SOCIETY.

CONVEYANCING AND LAW OF PROPERTY—Letters of administration—Grant of—Sale of real estate by administratrix—Subsequent discovery of will appointing executors—Revocation of letters of administration—Grant of probate to executors—Validity of purchaser's title
See ADMINISTRATION. 2. **13**

COPYRIGHT — *Literary Work — Song — "First published"—"Issue of copies to the public"—Simultaneous Publication Abroad—Colourable Imitation—Reply Song—Infringement—Injunction—Copyright Act*, 1911 (1 & 2 *Geo.* 5, *c.* 46), *ss.* 1, 2, 5, 15, 35.

A song the words of which were composed in America by an American was published simultaneously in New York and London on May 5, 1913. In April, 1913, the owners of the American copyright in the song had sent to the plaintiffs twelve copies of the song with instructions to copyright the song in the United Kingdom on May 5. On that day the plaintiffs sent one copy to the British Museum, one copy they filed for reference in their office, six copies they exposed for sale on the counter of their retail premises in London, and the next day they sent the remaining four copies to the agent for the universities. There was no immediate demand for the song, and after a fortnight the plaintiffs placed the six copies amongst their general stock. The song was first sung in London in July, 1913, and was a great success, and the plaintiffs then purchased the copyright in the song for the British Empire from the American owners, and made large sales. Subsequently the defendants published a song which was based upon the words of the plaintiffs' song and was what was known as an answer or reply song:—

Held by Neville J. and the Court of Appeal, that the plaintiffs' song was "first published" in London on May 5, 1913, and that there had been "an issue of copies to the public" within the meaning of the provisions of the Copyright Act, 1911. But

Held by the Court of Appeal, reversing the decision of Neville J., on the facts, that the defendants' song, although a reply song, was not a colourable imitation of the plaintiffs' song and did not infringe their copyright therein. FRANCIS, DAY & HUNTER *v.* FELDMAN & CO.
C. A. 728

COPYRIGHT—*continued.*

2. —— *Music—Assignee of Musical Copyright —Copyright in Song with Pianoforte Accompaniment—Record for Mechanical Performance—Copy made for Purpose of making Orchestral Accompaniment to be recorded on Graphophone Disc—Single Copy—Right to make Discs on Notice to Author—Copyright Act*, 1911 (1 & 2 *Geo.* 5, *c.* 46), *s.* 1, *sub-s.* 2 ; *s.* 19, *sub-ss.* 2, 7.

The rights given by the Copyright Act, 1911, to the author of a musical production to restrain the manufacturer of records for mechanical reproduction of the music, and to other persons to make such records upon giving notice to the author and paying royalties to him, do not affect any copyright vested in an assignee under an assignment made before the Act. The making of a single copy of a song with pianoforte accompaniment, the copyright of which is vested in such an assignee, for the purpose of making an orchestral accompaniment, is an infringement of the assignee's copyright, and is not justified because it is done for the purpose of making a graphophone disc of and for which the notice and royalties prescribed under the Act have been given and paid to the author.

Judgment of Neville J. [1914] 2 Ch. 124 affirmed. CHAPPELL & CO., LIMITED *v.* COLUMBIA GRAPHOPHONE COMPANY - **C. A. 745**

3. —— *Picture—Copyright in Picture not registered at the Commencement of the Copyright Act*, 1911—*Memorandum of Assignment*—"*Four Golfing Subjects*"—*Parol Evidence to identify—Offer before Action—Right of Plaintiff to Order —Costs—Fine Arts Copyright Act*, 1862 (25 & 26 *Vict. c.* 68), *ss.* 1, 3—*Copyright Act*, 1911 (1 & 2 *Geo.* 5, *c.* 46), *s.* 1, *sub-ss.* 1, 2 ; *s.* 2, *sub-s.* 1 (*iii*) ; *s.* 5, *sub-ss.* 1, 2 ; *Sched. I.*

In the case of a picture assigned with all copyrights, but not registered under the Fine Arts Copyright Act, 1862, at the time of the commencement of the Copyright Act, 1911, the owner of the picture has such a "copyright" as will enable him to receive the substituted and enlarged copyright given to owners of copyright in substitution for their existing rights by s. 5 and Sched. I. of the Copyright Act, 1911.

The only memorandum of an assignment of copyright was a receipt for a sum paid for "Five original card designs inclusive of all copyrights. Subjects : four golfing subjects : one Teddy Bear painting."

Held, that parol evidence was admissible to identify the designs intended, and the memorandum was sufficient within s. 3 of the Copyright Act, 1862.

A plaintiff whose copyright is infringed has a right to an order of the Court restraining the infringement, and is not prevented from exercising his rights by an offer of the infringer before action that he will promise not to do it again and will pay such damages as may be agreed upon. If such an offer is repeated after writ issued, with the addition of an offer to submit to an order and pay costs to date, the plaintiffs may be deprived of any subsequent costs. E. W. SAVORY, LIMITED *v.* WORLD OF GOLF, LIMITED - - - **Neville J. 566**

COPYRIGHT—*continued.*

—— Practice — Judgment — Application for judgment—Infringement of copyright, registered design, trade mark, or patent —Consent to order in chambers—Motion in Court—Costs - - - **576**
See PRACTICE. 2.

COSTS — *Taxation of Costs — Two Defendants appearing by same Solicitor—Separate Defences and Leading Counsel—Discretion of Taxing Master—Practice—Rules of the Supreme Court*, 1883, *Order LXV., r.* 27, *sub-r.* 8.

The expression "other proceedings" in Order LXV., r. 27, sub-r. 8, includes the trial of the action and is not limited to interlocutory proceedings ; but the question whether two or more defendants appearing by the same solicitor should be allowed the costs of separate defences and of separate counsel at the trial is not by sub-r. 8 made a matter purely within the taxing Master's discretion, but is open to review by the Court.

Ager v. *Blacklock & Co.* (1887) 56 L. T. 890 followed in preference to *Beattie* v. *Lord Ebury* [1873] W. N. 194 ; 29 L. T. 419.

Boswell v. *Coaks* (1887) 36 Ch. D. 444 distinguished. A. G. SPALDING *v.* A. W. GAMAGE, LIMITED - - - - **Sargant J. 405**

—— Company — Indemnity to servants — Special article—Libel and slander—Costs of successfully defending action
See COMPANY. 3. **271**

—— Copyright—Copyright in picture not registered at the commencement of the Copyright Act, 1911—Memorandum of assignment—"Four golfing subjects"—Parol evidence to identify—Offer before action—Right of plaintiff to order—Costs - - - - - - **566**
See COPYRIGHT. 3.

—— Copyright—Practice — Judgment — Application for judgment — Infringement of copyright, registered design, trade mark, or patent—Consent to order in chambers—Motion in Court - **576**
See PRACTICE. 2.

—— Lands Clauses Consolidation Act, 1845, s. 80 —Compulsory taking of land—Payment of purchase-money into Court—Application for payment out—Letters of administration — Heir-at-law —Vesting of property - - - - **547**
See LANDS CLAUSES ACT.

COURT OF PROBATE ACT, 1857, ss. 75, 77, 78
See ADMINISTRATION. 2. **13**

COUSIN — Will — Construction — Gift to "my cousins and half cousins" - - **580**
See WILL. 5.

COVENANT—Contract for sale of land—Restrictive stipulation for benefit of adjoining lands of vendor—Covenant running with the land—Contract superseded by conveyance - - - **231**
See VENDOR AND PURCHASER. 3.

COVENANT—*continued.*

—— Landlord and tenant—Lease—Covenant for perpetual renewal—Principle of construction—Presumption – 705
See LANDLORD AND TENANT. 1.

—— Lease—Covenant to build—Covenant to repair—Covenant to deliver up—Continuing breach—Waiver—Re-entry—Measure of damages – – – 516
See LANDLORD AND TENANT. 3.

—— Restraint of trade—Reasonable protection of covenantee—Severability of covenant—Procuring breach of covenant—Cause of action—Damage—Proof of damage—Damages inferred—General observations on the present state of the law relating to covenants in restraint of trade – – – – – 603
See RESTRAINT OF TRADE.

—— Retainer—Right of retainer—Covenant to pay sum to trustees of marriage settlement—Statute-barred debt—Cestui que trust of debt one of several legal personal representatives of covenantor—Claim of trustees of settlement – 720
See RETAINER.

—— Water — Covenant to supply farmhouse and farm buildings free of charge—Covenant running with the land—Severable covenant—Local government
See WATER. 1. 138

CREDITOR—Administration—Executor's right of retainer—Debt arising from breach of trust by testator—Right to retain against specialty creditors – – 395
See ADMINISTRATION. 1.

—— Bankruptcy.
See under BANKRUPTCY.

—— Company—Reduction of capital—Consent of creditors—Evidence—Holders of bearer debentures—No list—Trust deed—Majority clause—Extraordinary resolution – – – – – 187
See COMPANY. 6.

—— Judgment creditor.
See under JUDGMENT CREDITOR.

CROSS-REMAINDERS — Will — Construction—Implication of cross-remainders during life of survivor – – – – 182
See WILL. 4.

CURATE—Perpetual curate – – – 308
See ECCLESIASTICAL LAW.

DAMAGES—Gasworks—Discharge of noxious and offensive fumes—Damage to plantation on adjoining property—Depreciation of property—No house within affected area — Injunction—Nuisance
See GAS. 47

DAMAGES—*continued.*

—— Lease—Covenants—Continuing breach—Waiver — Re-entry — Measure of damages – – – – – 516
See LANDLORD AND TENANT. 2.

—— Restraint of trade—Covenant—Reasonable protection of covenantee—Severability of covenant—Procuring breach of covenant — Cause of action — Damages—Proof of damage—Damages inferred—General observations on the present state of the law relating to covenants in restraint of trade – – – 603
See RESTRAINT OF TRADE.

—— Temperance festival on moor — Roundabouts and shows—"Fair"—Injury to herbage — Injunction — Measure of damages – – – – – 293
See TOWN MOOR.

DEBENTURES—Company.
See under COMPANY.

—— Insurance of debentures—Re-insurance—Contract of indemnity—Liquidation—Scheme of arrangement — Limit of liability of re-insurer – – 617
See INSURANCE (DEBENTURES).

DEBT—Statute-barred debt—Right of retainer—Covenant to pay sum to trustees of marriage settlement—Cestui que trust of debt one of several legal personal representatives of covenantor—Claim of trustees of settlement – – 720
See RETAINER.

DEFAMATION—Company—Indemnity to servants — Special article — Libel and slander—Costs of successfully defending action – – – – – 271
See COMPANY. 3.

DEPOSIT—Life policy—Policy holder—Agreement for employment in life department—Annuity granted in compromise of action for breach of agreement—Charge on deposit – – – 77
See INSURANCE (LIFE).

DESIGN—Infringement of copyright, registered design, trade mark, or patent—Consent to order in chambers—Motion in Court Costs – – – – – 576
See PRACTICE. 2.

DIRECTORS—Company.
See under COMPANY.

DISCOVERY — *Interrogatories — Patent — Infringement—Interrogatories to discover Names of Manufacturers of Infringing Articles—Admissibility—Practice.*

The plaintiffs in an action to restrain infringement of their patent issued a summons for further and better answers by the defendants to certain interrogatories. The plaintiffs were the owners of a patent for improvements in the manufacture of incandescent electric lamps. By two of their interrogatories they sought to

DISCOVERY—*continued.*

discover from the defendants whether a particular set of 150 lamps were manufactured wholly or in part by a specified firm in Paris, or by what other persons or firms; and whether the said lamps were supplied to the defendants by the particular firm in Paris, or by what other persons or firms. The defendants admitted the sale of these lamps by them to a firm in England, but stated that none of the lamps were manufactured by the defendants; and, further, that they had no knowledge of the process employed in the manufacture of the filaments of the lamps. They objected, however, to answer the two interrogatories in question on the ground that they were irrelevant and immaterial to the issues to be tried in the action, and were not sought bona fide for the purposes of the action. The avowed object of the plaintiffs was to ascertain from the defendants the sources from which the lamps were obtained, so as to enable them to identify and establish the process of manufacture employed in the production of these particular lamps:—

Held (reversing the decision of Eve J. [1914] 1 Ch. 699), that the point was covered by *Marriott* v. *Chamberlain* (1886) 17 Q. B. D. 154 and *Nash* v. *Layton* [1911] 2 Ch. 71, and that the defendants must answer the interrogatories. OSRAM LAMP WORKS, LIMITED *v.* GABRIEL LAMP COMPANY - - - - **C. A. 129**

—— Letters of administration, Grant of—Sale of real estate by administratrix—Subsequent discovery of will appointing executors — Revocation of letters of administration — Grant of probate to executors — Validity of purchaser's title - - - - - - **13**
See ADMINISTRATION. 2.

DISCRETION—Costs, Taxation of—Discretion of taxing Master—Two defendants appearing by same solicitor—Separate defences and leading counsel - - - **405**
See COSTS.

DISTRIBUTION — Will — Construction—Shares of residue — Period of distribution—Advances to residuary legatees—Recoupment of income to unadvanced legatees—Hotchpot - - - **584**
See WILL. 8.

DOMESTIC PURPOSES — Water — Supply — Restaurant—Option of Board to supply by meter—Trade or manufacturing purposes - - - - - **734**
See WATER. 2.

DRAINAGE — River Thames — Drainage of metropolis—London County Council—Powers—Construction of works "in, over, or under" bed of Thames—Port of London Authority—Approval - **362**
See THAMES.

DUTY—Inland Revenue.
See under REVENUE.

DWELLINGS — Local government—Unhealthy dwellings — Obstructive building — Pulling down — Separate workshop — "Building" - - - - **686**
See LOCAL GOVERNMENT.

EASEMENT—Way, Right of.
See under WAY, RIGHT OF.

ECCLESIASTICAL LAW — *Parish Church — Conventual Church—Appropriation—Rectory — Perpetual Curate—One of Two Churchwardens —Right to sue—Suppression of Priory—Grant from Crown—Sale of Bells—Long Possession—Evidence — Historical Work — "Habington's Survey of Worcestershire"—Evidence of Particular Fact.*

This action was brought by the perpetual curate and one of the churchwardens of the parish church of Little Malvern against the lord of the manor to recover possession of certain ruins which were formerly choir aisles and transepts of the church but had been in possession of the lord of the manor since the dissolution of the lesser monasteries in 1535. The parish church, as it was now, and had been for generations, used, consisted of the tower and choir only of a larger church, which had been at some time walled off from the ruined aisles and transepts. The question was whether the original church had been a parish church appropriated to the priory, or a conventual church in part of which the parishioners had been allowed to worship. The site of the priory which included the church if it was conventual had been granted by the Crown to the defendants' predecessors in title, and they had been in possession of the ruins ever since.

A preliminary objection was taken that the plaintiffs had no right to sue:—

Held, that one of two churchwardens cannot sue alone, and as against the churchwarden the objection was good;

That a perpetual curate had sufficient possession of everything which forms part of the parish church to enable him to sue for possession and for rights over the church, for the spiritual purposes of his cure, and that as against him the objection failed.

Habington's Survey of Worcestershire, a work written in the seventeenth century but only recently published, and regarded as an historical authority, was tendered as evidence of a particular fact, namely, the physical condition of the church when the author saw it, but rejected.

Attorney-General v. *Horner* (No. 2) [1913] 2 Ch. 140 applied.

Held, also, upon the evidence and the inference to be drawn from ancient documents and from the long possession of the defendants, that the church was originally a conventual church, and that the parochial rights therein were confined to the parts actually used as a parish church since the dissolution.

Semble, a rectory may be attached to a part of a church; and the fact that the "Rectory of Little Malvern" is entered in the Returns of the Court of Augmentations among the spiritualities of the suppressed priory does not prove

ECCLESIASTICAL LAW—*continued.*

that the whole of the church of Little Malvern was a parish church.

The fact that the officers of the Court of Augmentations sold the bells of the church after the dissolution is strong evidence that the whole building was not a parish church. FOWKE *v.* BERINGTON - - - - **Astbury J. 308**

ELECTION—Directors—Casual vacancy—Election of sole remaining director—Qualification—Appointment of unqualified persons—Irregular allotment—Validation of irregular acts - - - **506**
See COMPANY. 1.

ELECTRIC LIGHTING — *Local Authority — Electric Supply—Power and Lighting—Similar Circumstances — Undue Preference — Electric Lighting Act*, 1882 (45 & 46 *Vict. c.* 56), *ss.* 19, 20.

The Electric Lighting Act, 1882, provides by s. 19, "Where a supply of electricity is provided in any part of an area for private purposes, then except in so far as is otherwise provided by the terms of the license, order, or special Act authorising such supply, every company or person within that part of the area shall, on application, be entitled to a supply on the same terms on which any other company or person in such part of the area is entitled under similar circumstances to a corresponding supply"; and by s. 20, "The undertakers shall not, in making any agreements for a supply of electricity, show any undue preference for any local authority, company, or person, but, save as aforesaid, they may make such charges for the supply of electricity as may be agreed upon, not exceeding the limits of price imposed by or in pursuance of the license, order, or special Act authorising them to supply electricity":—

Held, that the general language of these sections and their relation to each other being similar to those of the Railways Clauses Act, 1845, s. 90, and the Railway and Canal Traffic Act, 1854, s. 2, the present case was governed by the clear distinction to be found in the decisions on those sections between legitimate and illegitimate reasons for making a lower or preferential charge under legislation of this kind; and the governing distinction defined as follows:

A. must not be charged less than B. merely to overcome a greater reluctance on the part of A. to become a customer, or to induce A. to become a customer in respect of another supply, although either of these reasons might be a good commercial reason for charging less to A. were the public undertakers merely carrying on any ordinary commercial business. On the other hand, any circumstances which render it less costly or otherwise more profitable to supply A. than B. constitute a legitimate reason for making a lower charge to A. for the same supply. And if the Court once came to the conclusion that some such circumstances existed, then proof would not be required that the diminution in the charge was precisely equivalent to the diminution in the cost of the supply.

The defendants, who were the undertakers under the Long Eaton Electric Lighting Order, 1900, and with and under the powers and obligations imposed by that Order and the Electric Lighting Act, 1882, recently issued a circular with reference to the price charged for electricity to power consumers, the effect of which was in certain cases to make a lower charge for power purposes to consumer A., by whom electricity for the supply of both power and lighting was taken exclusively from the defendants, and a higher charge to consumer B, by whom electricity for the supply of power or of power and partial lighting only was taken:—

Held, applying the above principles to the facts of the case, that the differentiation created by the circular was a breach of both ss. 19 and 20 of the Electric Lighting Act, 1882—of s. 19 because the supply of electricity to consumer B. for power purposes was a supply corresponding with the supply to consumer A. for power purposes, and was applied for and given under similar circumstances; and of s. 20 because the lower charge to A. was an undue preference. ATTORNEY-GENERAL *v.* LONG EATON URBAN DISTRICT COUNCIL - - **Sargant J. 251**

ELEGIT, WRIT OF—Land in mortgage—Order appointing receiver — Charge, when operative—Payment of rent in advance by tenant—Right of judgment creditor
See JUDGMENT CREDITOR. **211**

ENGINEER—Company—Indemnity to servants—Special article—Mining engineer—Libel and slander—Costs of successfully defending action - - **271**
See COMPANY. 3.

EQUITABLE ESTOPPEL.
See under ESTOPPEL.

ESTATE DUTY.
See under REVENUE.

ESTOPPEL — Equitable — Yorkshire Registries Act, 1884—Registered mortgage - **219**
See REGISTRIES ACTS.

EVIDENCE—Church—"Habington's Survey of Worcestershire"—Evidence of particular fact—Conventual church—Rectory—Sale of bells - - - - **308**
See ECCLESIASTICAL LAW.

—— Company—Reduction of capital—Consent of creditors—Holders of bearer debentures—No list—Trust deed—Majority clause—Extraordinary resolution **187**
See COMPANY. 6.

—— Parol evidence—Copyright—Copyright in picture not registered at the commencement of the Copyright Act, 1911 — Memorandum of assignment—"Four golfing subjects"—Parol evidence to identify—Offer before action—Right of plaintiff to order—Costs - - **566**
See COPYRIGHT. 3.

EXECUTOR—Administration—Executor's right of retainer—Debt arising from breach of trust by testator—One executor concurring in breach of trust—Another executor appointed trustee after testator's death—Right to retain against specialty creditors – – – **395**
See ADMINISTRATION. 1.

—— Company — Reconstruction — Right of executors of deceased member to dissent
See COMPANY. 5. **670**

—— Letters of administration, Grant of—Sale of real estate by administratrix—Subsequent discovery of will appointing executors — Revocation of letters of administration—Grant of probate to executors — Validity of purchaser's title – – – – – – **13**
See ADMINISTRATION. 2.

—— Settled land—Limited owners with powers of life tenant—Executors of deceased owner—Beneficially entitled – **134**
See SETTLED LAND. 2.

—— Will—Construction—Residue to be at discretion of executor and at his own disposal—Prior legacy in will to executor — Executor, whether entitled beneficially – – – – – **173**
See WILL. 7.

FAIR—Temperance festival on moor — Roundabouts and shows—"Fair"—Injury to herbage — Injunction — Measure of damages – – – – – **293**
See TOWN MOOR.

FIDUCIARY POSITION—Company—Directors—Contract with another company in which a director holds shares—Rescission – – – – – – **488**
See COMPANY. 2.

FINANCE ACTS.
See under REVENUE.

FINE ARTS COPYRIGHT ACT, 1911 – **566**
See COPYRIGHT. 3.

FOREIGN GOVERNMENT—Bonds to bearer—Custody of testatrix's bankers—Will—Construction—Specific bequest—Securities "standing in my name" – **115**
See WILL. 9.

FRIENDLY SOCIETY—*Conversion into Limited Company—Memorandum of Association—Enlargement of Objects—Special Resolution—Validity—"Members" of the Company—Friendly Societies Act*, 1896 (59 & 60 *Vict. c.* 25), *s.* 71—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 9, 24.

A burial society which subsequently conducted life assurance business up to a limited amount was registered under the Friendly Societies Act, 1896, and attained to a membership of 373,000, with an income of 149,000*l.* a year. In 1913 a special resolution was passed for the conversion of the society into a company limited by shares pursuant to s. 71 of the Friendly Societies Act, 1896. The objects of the company under its memorandum were restricted to the objects of the society immediately prior to the conversion. There were no signatories to the memorandum of association, and no register of shareholders of the company; nor had any shares been in fact allotted. It was estimated that two years might elapse before the allotment of shares could be made. In 1914 a special resolution of the company was passed altering and extending the object clauses of the memorandum. Upon a petition being presented by the company for the confirmation by the Court of this special resolution :—

Held, that the conversion of the society into a limited company under s. 71 of the Friendly Societies Act, 1896, did not involve the simultaneous conversion of the members of the society into members of the company, and inasmuch as there were no members of the company in existence within the definition of s. 24 of the Companies (Consolidation) Act, 1908, there was no special resolution properly passed which the Court could confirm, and no such order as was asked could be made on the petition. *In re* BLACKBURN PHILANTHROPIC ASSURANCE COMPANY, LIMITED – – – – **Eve J. 430**

FUTURITY—Words of—Will—Construction **61**
See WILL. 12.

GAMING—Action for account—Bookmaking and betting business—Capital not absorbed in betting – – – – – **98**
See PARTNERSHIP.

GAMING ACT, 1892, s. 1 – – – **98**
See PARTNERSHIP.

GAS — *Nuisance — Gasworks — Discharge of Noxious and Offensive Fumes—Damage to Plantation on Adjoining Property—Depreciation of Property—No House within Affected Area—Injunction—Damages.*

The plaintiff was the owner and occupier of a dwelling-house and park which adjoined the defendants' gasworks. The house was situated at a distance of between 400 and 500 yards from the gasworks. Immediately adjoining the defendant's premises was a plantation of trees 16 yards in width and 75 yards in length which had been planted by the plaintiff to screen off the gasworks. The fumes and smoke from the gasworks were carried by the prevailing wind across the plantation for a distance of 100 to 200 yards on to the plaintiff's premises and had destroyed and injuriously affected them to such an extent that the tops of some of the trees were dying whilst others were dead. There was no house on the plaintiff's property within the affected area. In an action brought by the plaintiff for an injunction to restrain the defendants from carrying on their works so as to cause a nuisance or injury to the plaintiff or his property :—

Held, that the fumes and smoke discharged by the defendants' gasworks over the plaintiff's

GAS—*continued.*

premises caused a serious, growing, and permanent injury to the plaintiff's property; that the injury being of a continuous nature it was impossible to measure the damage thereby occasioned with any certainty; and that the plaintiff was therefore entitled to the injunction he asked.

Per Buckley L.J.: If the owner of a property, be it a house, or a garden, or a park, or anything else, not necessarily a house or structure, is so substantially injured in the reasonable enjoyment of his property as that he sustains that which is equivalent to a legal nuisance, he is entitled to an injunction to restrain the continuance of the nuisance.

Sturges v. *Bridgman* (1879) 11 Ch. D. 852 distinguished.

Decision of Joyce J. affirmed. WOOD *v.* CONWAY CORPORATION - - - **C. A. 47**

—— "Main" or "service pipe"—Extension of mains—Company—Local government—Injunction - - - - **146**
See COMPANY. 4.

GASWORKS.
See under GAS.

GIFT—Charity—Hospital—Founder's deed of gift—"Wholly maintained by voluntary contributions"—One original contribution—Power to apply capital or income for general purposes of charity—Jurisdiction of Charity Commissioners—Exemption - - - - **713**
See CHARITY. 1.

—— Will—Construction—Gift to "my cousins and half cousins" - - - **580**
See WILL. 5.

—— Will — Legacy — Ademption — Particular purpose—Bequest for purchase of land for benefit of parish church—Subsequent purchase and gift of land for like purpose—Both gifts in memory of testator's wife—Codicil confirming will
See WILL. 1. **422**

GRANT—Way, Right of—Construction of grant—Easement—Private road—Right of access of owner of dominant tenement—Obstruction by gates - - **653**
See WAY, RIGHT OF.

GRANT OF ADMINISTRATION.
See under ADMINISTRATION.

GRANT OF LEASE.
See under LEASE.

GRAPHOPHONE DISC—Single copy—Copyright
See COPYRIGHT. 2. **745**

HOSPITAL—Charity—"Wholly maintained by voluntary contributions"—Founder's deed of gift—One original contribution—Power to apply capital or income for general purposes of charity—Jurisdiction of Charity Commissioners—Exemption - - - - - - **713**
See CHARITY. 1.

HOTCHPOT—Will—Construction—Shares of residue—Period of distribution—Advances to residuary legatees—Recoupment of income to unadvanced legatees
See WILL. 8. **584**

HOUSING OF THE WORKING CLASSES ACT, 1890, ss. 38, 41 - - - - **686**
See LOCAL GOVERNMENT.

HOUSING, TOWN PLANNING, &c., ACT, 1908, s. 46; Sched. II. - - - **686**
See LOCAL GOVERNMENT.

IMITATION—Colourable imitation—Copyright—Literary work—Song—"First published"—"Issue of copies to the public"—Simultaneous publication abroad—Reply song—Infringement—Injunction
See COPYRIGHT. 1. **728**

INCOME—Gift of income to children during their lives or to issue of any dying before the others—Gifts over after death of all children to grandchildren — Implication of cross-remainders during life of survivor - - - - - **182**
See WILL. 4.

—— Tenant for life and remainderman.
See under TENANT FOR LIFE AND REMAINDERMAN.

INCOME FEE—Trustee—Public Trustee—Incidence—Life annuities - - **456**
See TRUSTEE.

INDEMNITY—Company—Indemnity to servants—Special article—Common law right—Mining engineer—Scope of employment—Libel and slander—Costs of successfully defending action - **271**
See COMPANY. 3.

—— Contract of indemnity—Insurance of debentures—Re-insurance—Liquidation—Scheme of arrangement—Limit of liability of re-insurer - - - **617**
See INSURANCE (DEBENTURES)

INFRINGEMENT—Copyright.
See under COPYRIGHT.

—— Patent.
See under PATENT.

—— Patent—Interrogatories to discover names of manufacturers of infringing articles—Admissibility—Practice - - **129**
See DISCOVERY.

—— Practice—Infringement of copyright, registered design, trade mark, or patent—Judgment—Application for judgment—Consent to order in chambers—Motion in Court - - - **576**
See PRACTICE. 2.

INJUNCTION — Company — Gas — "Main" or "service pipe"—Extension of mains—Local government – – – **146**
See COMPANY. 4.

—— Copyright—Literary work—Song—"First published"—"Issue of copies to the public" — Simultaneous publication abroad—Colourable imitation—Reply song—Infringement – – – **728**
See COPYRIGHT. 1.

—— Nuisance—Gasworks—Discharge of noxious and offensive fumes—Damage to plantation on adjoining property—Depreciation of property—No house within affected area—Damages – – **47**
See GAS.

—— Town moor—Freemen's right to depasture cattle on moor—Stint tickets—"Fair"—Injury to herbage — Injunction — Measure of damages – – – **293**
See TOWN MOOR.

INSURANCE (LIFE)—*Deposit—Life Policy—Policy Holder—Agreement for Employment in Life Department—Annuity granted in Compromise of Action for Breach of Agreement—Charge on Deposit—Assurance Companies Act*, 1909 (9 *Edw.* 7, *c.* 49), *ss.* 1 (*a*), 2; *s.* 3, *sub-s.* 2; *s.* 30 (*a*), (*b*).

An annuity granted by way of compromise of a claim for damages against a life, fire, and accident assurance company for breach of contract by the life department is an annuity within s. 30 (*b*) of the Assurance Companies Act, 1909, and the annuitant is a policy holder and has a prior claim to be paid out of the life deposit.

The company was incorporated to carry on every kind of insurance except employers' liability insurance and to grant annuities of all kinds, whether dependent upon human lives or otherwise, and a sum of 20,000*l.* was paid into Court as deposit under the Life Assurance Companies Acts, 1870 to 1872. The company was now being wound up under supervision and the claims on life policies had been satisfied. The manager of the life department brought an action against the company for breach of his agreement of employment, and the action was settled on terms whereby the company was to pay him a life annuity of 240*l.*, and he was to release the company from all claims. On a petition by the company and its liquidator for the payment out of Court of the deposit fund to the liquidator, after payment of the charges thereon, for distribution as part of the assets of the company, the manager claimed that his annuity constituted a charge on the life deposit fund in priority to any claims other than life assurance claims:—

Held (reversing on that point the decision of Astbury J. [1914] 1 Ch. 724), that the claimant's annuity was a life annuity within the Act of 1909 so as to give him a prior claim on the deposit fund.

In re BRITISH UNION AND NATIONAL INSURANCE COMPANY, LIMITED – **C. A. 77**

INSURANCE OF DEBENTURES—*Re-insurance—Contract of Indemnity—Liquidation—Scheme of Arrangement—Limit of Liability of Re-insurer.*

A company issued debentures in each of which it promised to pay 100*l.* on August 30, 1910, or upon such earlier day as the principal sum should become payable in accordance with the conditions indorsed thereon, and to pay interest in the meantime. Under the conditions the principal sum became payable on the happening of any one of certain events, as, for instance, default in payment of interest or the winding up of the company.

A guarantee society by a policy printed at the foot of each debenture guaranteed to the registered holder thereof payment of the principal sum to become due under the debenture in manner following, namely, if the company made default in payment of the principal sum or any part thereof the society would pay the amount thereof upon whichever of the days following should first happen, namely, on August 30, 1910, or on the day after the securities for the debenture-holders should have been enforced and completely realized and distributed. Subsequently the guarantee society entered into a contract with a mortgage insurance company whereby the latter in consideration of a yearly premium guaranteed the society to the extent of two-elevenths of the risk insured by the society under their policy, and the like proportion of all costs and expenses incurred by the society with the consent of the mortgage insurance company in respect of any claim arising under the policy. Default was made in payment of the debentures, and in 1909 the society entered into possession of the debenture-holders' securities. Shortly afterwards the society went into liquidation, and after the debenture-holders' securities had been realized and the proceeds distributed there remained a deficiency due to them of 4988*l.*:—

Held, that the contract between the society and the mortgage insurance company was a contract of insurance, and that the company was liable to pay to the liquidator of the society two-elevenths of the deficiency of 4988*l.*, and not merely two-elevenths of the dividend payable by the society to the debenture-holders upon that deficiency.

Held, further, that even if the contract was a contract of indemnity the mortgage insurance company would still be liable to the liquidator for two-elevenths of the deficiency.

In re Richardson [1911] 2 K. B. 705 discussed.

Decision of Neville J. [1913] 2 Ch. 604 reversed.

In re LAW GUARANTEE TRUST AND ACCIDENT SOCIETY, LIMITED. LIVERPOOL MORTGAGE INSURANCE COMPANY'S CASE **C. A. 617**

INTERROGATORIES — Patent—Infringement—Interrogatories to discover names of manufacturers of infringing articles—Practice — Admissibility – – **129**
See DISCOVERY.

INVENTED WORD — Trade mark — "Parlograph"—Word sufficiently referring to origin of goods – – – – **103**
See TRADE MARK.

INVESTMENT—Investment in land—Charity—Incorporation by Royal Charter, 1739—Voluntary contributions—Gift of land without expression of trust—"Endowment"—Charity "maintained partly by voluntary subscriptions and partly by income arising from endowment"—Power of disposition—Exemption from "jurisdiction or control of the said board or the powers or provisions" of the Act - - - - - - **154**
See CHARITY. 2.

IRREGULARITY — Company — Directors — Fiduciary position — Contract with another company in which a director holds shares—Notice of irregularity—Rescission - - - - - **488**
See COMPANY. 2.

JOINT TENANCY—Partition—No joint tenancy or tenancy in common — Overriding term - - - - - - **1**
See PARTITION.

JUDGMENT — Practice — Judgment — Application for judgment — Infringement of copyright, registered design, trade mark, or patent—Consent to order in chambers — Motion in Court—Costs
See PRACTICE. 2. **576**

JUDGMENT CREDITOR—*Land in Mortgage—Writ of Elegit—Order appointing Receiver—Charge, when operative—Payment of Rent in Advance by Tenant—Right of Judgment Creditor—Judgments Act*, 1838 (1 *&* 2 *Vict. c.* 110), *s.* 13—*Judgments Act*, 1864 (27 *&* 28 *Vict. c.* 112), *s.* 1—*Land Charges Registration and Searches Act*, 1888 (51 *&* 52 *Vict. c.* 51), *s.* 5—*Land Charges Act*, 1900 (63 *&* 64 *Vict. c.* 26), *s.* 2.

Where land is subject to a mortgage and incapable of being delivered in execution under a writ of elegit the registration of a writ of elegit does not operate as a charge on the land under the Land Charges Act, 1900, s. 2. Sect. 2 of that Act must have effect given to it in view of the provisions of s. 5 of the Land Charges Registration and Searches Act, 1888, and the true meaning of the two sections read together is that, in place of the actual delivery in execution, whether legal or equitable, which was required by s. 1 of the Judgments Act, 1864, as a condition precedent to the charge created by s. 13 of the Judgments Act, 1838, becoming effective, there is now substituted the registration of a writ or order capable of affecting the land.

A judgment creditor issued and duly registered writs of elegit against the judgment debtor and subsequently obtained and duly registered an order appointing a receiver of the rents and profits of the judgment debtor's land which was subject to a mortgage and incapable of being delivered in execution under a writ of elegit. After the registration of the writs of elegit but before the appointment of the receiver the tenant of the land, having no

JUDGMENT CREDITOR—*continued.*

notice of the judgment creditor's claim, paid rent in advance to the judgment debtor:—

Held, that the payment was a good payment of rent as between the tenant and the judgment creditor.

Green v. *Rheinberg* (1911) 104 L. T. 149 followed.

De Nicholls v. *Saunders* (1870) L. R. 5 C. P. 589 distinguished. LORD ASHBURTON *v.* NOCTON
Sargant J. 211

JUDGMENTS ACT, 1838, s. 13. - - **211**
See JUDGMENT CREDITOR.

JURISDICTION—Partition—No joint tenancy or tenancy in common—Overriding term - - - - - - - **1**
See PARTITION.

LAND CHARGES ACT, 1900, s. 2. - - **211**
See JUDGMENT CREDITOR.

LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888, s. 5 - **211**
See JUDGMENT CREDITOR.

LAND TRANSFER—Letters of administration—Grant of—Sale of real estate by administratrix—Subsequent discovery of will appointing executors — Revocation of letters of administration — Grant of probate to executors—Validity of purchaser's title - - - - **13**
See ADMINISTRATION. 2.

LAND TRANSFER ACT, 1897, ss. 1, 2, 11, 24
See ADMINISTRATION. 2. **13**

LANDLORD AND TENANT—*Lease—Covenant for Perpetual Renewal—Principle of Construction—Presumption.*

Covenant in a lease for twenty-one years that the lessors will "at the expiration of the first eleven years of the term hereby granted in case the lessee shall surrender or resign these presents and the term of twenty-one years hereby granted to the lessors and upon such surrender as aforesaid and paying to the lessors at the expiration of eleven years aforesaid or upon the 29th day of September next after the determination of the said eleven years the sum of 7*l.* 10*s.* for a fine for the said premises then the lessors shall and will at the proper costs and charges of the lessee grant unto the lessee a new lease of the premises hereby demised with the appurtenances for the term of twenty-one years to commence from the expiration of the said eleven years at with and under the like rents covenants and agreements as are in these presents mentioned expressed or contained and so often as every eleven years of the said term shall expire will grant and demise unto the lessee such new lease of the said premises upon surrender of the old lease as aforesaid and paying such fine of 7*l.* 10*s.* on the day or time hereinbefore limited or appointed":—

Held by the Court of Appeal, affirming the decision of Joyce J., that upon the true construction of the covenant the lessee was entitled

LANDLORD AND TENANT—*continued.*

to a perpetual right of renewal at the end of every successive period of eleven years. WYNN *v.* CONWAY CORPORATION – – **C. A. 705**

2. —— *Lease—Covenant to build—Covenant to repair—Covenant to deliver up—Continuing Breach — Waiver — Re-entry — Measure of Damages.*

Where there is an express covenant to build, both as to time and mode of building, no further covenant to build can be implied from a covenant to repair.

Dictum of Stirling J. to the contrary in *Jacob v. Down* [1900] 2 Ch. 156 disapproved.

Waiver of forfeiture for not building in accordance with such a covenant carries with it a waiver of forfeiture for breach of a covenant to repair the said buildings if and when erected.

Decision of Joyce J. reversed. STEPHENS *v.* JUNIOR ARMY AND NAVY STORES, LIMITED **C. A. 516**

LANDS CLAUSES ACT — *Costs — Compulsory taking of Land—Payment of Purchase-money into Court—Application for Payment out—Letters of Administration—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 80—*Heir-at-Law—Vesting of Property.*

Freehold property was purchased by the predecessors of the London County Council under their compulsory powers and the purchase-money was paid into Court. On the death of the tenant for life it became necessary to procure administration to two of her sons, and, in the case of one of them who disappeared in 1883, an order giving liberty to swear his death. In July, 1913, an order was made dividing up the fund and one-sixth was made payable to each of these administrators.

Held, affirming the decision of Astbury J., that the London County Council must pay the costs of obtaining the letters of administration in both cases and of the order giving leave to presume the death.

In re Lloyd and North London Railway (City Branch) Act, 1861, [1896] 2 Ch. 397, approved.

Until a legal personal representative is appointed freehold property vests in the heir. *In re* GRIGGS. *Ex parte* SCHOOL BOARD FOR LONDON – – – – – **C. A. 547**

LAPSE — Will—Legacy—Charitable bequest—Continuity of home—No lapse – **245**
See WILL. 6.

LEASE—Landlord and tenant.
See under LANDLORD AND TENANT.

—— Licensed premises—Lease by tenant for life—Charges under Licensing Acts—Compensation fund—Deduction from rent—Statutory provision against contracting out – – – – **353**
See SETTLED LAND. 1.

—— Licensed premises—Revenue—Increase of duty—Liability of grantor of lease to pay proportion of increase—"Grantor of lease"—Person in receipt of rents
See REVENUE. 1. **283**

LEASE—*continued.*

—— Revenue—Licensed premises—Increase of duty—Liability of grantor of lease to pay proportion of increase—"Grantor of lease"—Person in receipt of rents
See REVENUE. 2. **757**

LEGACY—Will.
See under WILL.

LETTERS OF ADMINISTRATION.
See under ADMINISTRATION.

LIABILITY—Limited liability of re-insurer—Insurance of debentures—Re-insurance—Contract of indemnity—Liquidation—Scheme of arrangement – – **617**
See INSURANCE (DEBENTURES).

LIBEL.
See under DEFAMATION.

LICENCE—Patent—Process—Licence to use and exercise process—Condition requiring licensee to purchase article used in process from patentee—Article not protected by patent—Defence to action for infringement – – – – **474**
See PATENT. 2.

—— Petition for compulsory licence—Patent—Form of opposition—Grounds stated—Petition referred to the Court—Particulars of grounds of opposition – **461**
See PATENT. 1.

—— Thames, River—Drainage of metropolis—London County Council — Powers — Construction of works "in, over, or under" bed of Thames—Port of London Authority—Approval – – – **362**
See THAMES.

LICENSED PREMISES—Licensing Acts.
See under LICENSING ACTS.

—— Revenue — Increase of duty — Lease — Liability of grantor of lease to pay proportion of increase — "Grantor of lease"—Person in receipt of rents **283**
See REVENUE. 1.

LICENSING ACTS—Licensed premises—Lease by tenant for life — Charges under Licensing Acts—Compensation fund—Deduction from rent—Statutory provision against contracting out – **353**
See SETTLED LAND. 1.

LIFE ANNUITIES—Trustee—Public Trustee—Income fee—Incidence – – **456**
See TRUSTEE.

LIFE INSURANCE.
See under INSURANCE (LIFE).

LIGHT — Vendor and purchaser — Contract—Enjoyment of light—Agreement that light enjoyed by licence — Non-disclosure—Specific performance—Forcing doubtful title on purchaser—Doubt if agreement binds land – – **538**
See VENDOR AND PURCHASER. 2.

LIMITATIONS, STATUTE OF—Bankruptcy—Death of bankrupt—Claim by creditors in the bankruptcy for balance of unsatisfied debts—Lapse of time – **68**
See BANKRUPTCY. 1.

LIQUIDATION—Insurance of debentures—Reinsurance—Contract of indemnity—Scheme of arrangement—Limit of liability of re-insurer – – – **617**
See INSURANCE (DEBENTURES).

LITERARY WORK—Copyright—Song—"First published"—"Issue of copies to the public" — Simultaneous publication abroad — Colourable imitation — Reply song—Infringement—Injunction **728**
See COPYRIGHT. 1.

LOCAL AUTHORITY—Electric supply—Power and lighting—Similar circumstances—Undue preference – – – **251**
See ELECTRIC LIGHTING.

LOCAL GOVERNMENT—*Unhealthy Dwellings—Obstructive Building—Pulling down—Separate Workshop—"Building"—Housing of the Working Classes Act*, 1890 (53 & 54 *Vict. c.* 70), *ss.* 38, 41—*Housing, Town Planning, &c., Act*, 1909 (9 *Edw.* 7, *c.* 44), *s.* 46 *and Sched. II.*

Sect. 38 of the Housing of the Working Classes Act, 1890, is not confined in its operation to buildings designed for human habitation.

A building (not a dwelling-house or any part of a dwelling-house within the definition contained in s. 29 of the Housing of the Working Classes Act, 1890, as amended by s. 49 of the Housing, Town Planning, &c., Act, 1909) constructed for and used solely as a cycle makers' and mechanics' workshop :—

Held, a "building" within s. 38 of the Act of 1890 as amended by s. 46 and Sched. II. of the Act of 1909, and capable of being dealt with by the local authority as an obstructive building under that section. JACKSON *v.* KNUTSFORD URBAN DISTRICT COUNCIL – – **Eve J. 686**

—— Company—Injunction — Gas—"Main" or "service pipe"—Extension of mains
See COMPANY. 4. **146**

—— Water.
See under WATER.

LONDON—Thames, River—Drainage of metropolis—London County Council—Powers—Construction of works "in, over, or under" bed of Thames—Port of London Authority—Approval – – – **362**
See THAMES.

MEMBERS—Friendly society—Conversion into limited company—"Members" of the company—Memorandum of association — Enlargement of objects — Special resolution—Validity – – – **430**
See FRIENDLY SOCIETY.

MERCHANT SHIPPING.
See under SHIPPING.

METROPOLIS.
See under LONDON.

METROPOLIS MANAGEMENT ACTS.
See under LONDON.

MINE — Company—Indemnity to servants—Special article—Mining engineer—Libel and slander — Costs of successfully defending action – – – **271**
See COMPANY. 3.

MOOR—Town moor.
See under TOWN MOOR.

MORTGAGE—Judgment creditor—Land in mortgage—Writ of elegit—Order appointing receiver—Charge, when operative—Payment of rent in advance by tenant—Right of judgment creditor – **211**
See JUDGMENT CREDITOR.

—— Yorkshire Registries Act, 1884—Erroneous representation by mortgagor to mortgagee as to land included in settlement—Subsequent acquisition of land by mortgagor—Subsequent mortgagee with notice — Registered mortgage — Equitable estoppel – – – – **219**
See REGISTRY ACTS.

MOTOR CARS—Washing motor cars in farmyard—Water authority — Covenant to supply farmhouse and farm buildings free of charge—Covenant running with the land—Severable covenant—Farmhouse altered and enlarged—No increased user of water for domestic purposes—Covenant as to farmhouse discharged—Local government – **138**
See WATER. 1.

MUSIC—Copyright—Assignee of musical copyright—Copyright in song with pianoforte accompaniment — Record for mechanical performance—Copy made for purpose of making orchestral accompaniment to be recorded on graphophone disc—Single copy—Right to make discs on notice to author **745**
See COPYRIGHT. 2.

MUTUAL DEALINGS — Bankruptcy—Set-off—Insolvent company — Winding-up — Secured creditor – – – **438**
See BANKRUPTCY. 2.

NEWCASTLE-UPON-TYNE IMPROVEMENT ACT, 1870, ss. 6, 7, 8, 11, 12, 17, 19
See TOWN MOOR. **293**

NOTICE—Company—Directors—Fiduciary position—Contract with another company in which a director holds shares—Notice of irregularity—Rescission **488**
See COMPANY. 2.

—— Yorkshire Registries Act — Registered mortgage—Equitable estoppel – **219**
See REGISTRY ACTS.

NUISANCE—Gasworks—Discharge of noxious and offensive fumes—Damage to plantation on adjoining property—Depreciation of property—No house within affected area—Injunction—Damages
See GAS. 47

PARISH CHURCH—Conventual church—Appropriation—Rectory—Perpetual curate—Suppression of Priory—Evidence 308
See ECCLESIASTICAL LAW.

PAROL EVIDENCE.
See under EVIDENCE.

PARTITION—*Jurisdiction—No Joint Tenancy or Tenancy in Common—Overriding Term.*
A part owner of land who is not a coparcener, a joint tenant, or a tenant in common is not entitled to a partition.
Where land is subject to an overriding term limited upon trusts for management which require the possession of the entirety to remain in the trustees, there is no right to a partition during the continuance of those trusts.
Testator by his will settled real estate upon certain trusts under which, in the events which had happened, the plaintiff was entitled, subject to a term of 1000 years, to the entire estate in fee simple, subject, however, as to one moiety thereof to have her estate divested by the attaining of a vested interest therein by other persons. The term was limited to trustees upon certain trusts for management and application of the rents under which, in the events which had happened, one moiety of the rents thereof was payable to the plaintiff together with a part of the other moiety.
In an action by the plaintiff for partition of the estate:—
Held, that the plaintiff was not entitled to a partition on the grounds (1.) that there was no joint tenancy or tenancy in common, and (2.) that the trusts for management required that the entirety of the property should remain in the trustees.
Principle stated by Cotton L.J. in *Taylor* v. *Grange* (1880) 15 Ch. D. 165, 168, applied.
DODD *v.* CATTELL – Warrington J. 1

PARTNERSHIP—*Action for Account—Bookmaking and Betting Business—Capital not absorbed in Betting—Gaming Act*, 1892 (55 & 56 *Vict. c.* 9), *s.* 1.
An action will lie by one partner in a bookmakers' and betting business against the other for an account of the partnership dealings, but the order for the account will leave it open to the defendant to object to repaying anything which represents profits. The plaintiff is entitled to recover any advances made by him which have not been lost in betting.
Thomas v. *Dey* (1908) 24 Times L. R. 272 not followed.
The decision of Chitty J. in *Thwaites* v. *Coulthwaite* [1896] 1 Ch. 496, although correct on the general law, cannot be regarded as a decision on s. 1 of the Gaming Act, 1892.
KEEN *v.* PRICE – – – Sargant J. 98

PASTURE—Town moor—Freemen's right to depasture cattle on moor—Stint tickets—"Fair"—Injunction – – 293
See TOWN MOOR.

PATENT—*Petition for Compulsory Licence—Form of Opposition—Grounds stated—Petition referred to the Court—Particulars of Grounds of Opposition—Patents and Designs Act*, 1907 (7 *Edw.* 7, *c.* 29), *s.* 24—*Patents Rules*, 1908, *rr.* 68—74—*Rules of the Supreme Court*, 1883, *Order XIX., rr.* 6 *and* 7; *Order LIIIA., rr.* 2, 7.
When a petition for the grant of a compulsory licence has been referred to the Court by the Board of Trade pursuant to s. 24 of the Patents and Designs Act, 1907, the petitioner is not entitled to particulars of the grounds of opposition stated in any notice of opposition given by the patentee pursuant to r. 70 of the Patents Rules, 1908, the grounds of opposition stated in such notice being matter for the consideration of the Board of Trade alone and not a proceeding under the petition when it has been referred to the Court. *In re* ROBIN ELECTRIC LAMP COMPANY, LIMITED – – Warrington J. 461

2. —— *Process—Licence to use and exercise Process—Condition requiring Licensee to purchase Article used in Process from Patentee—Article not protected by Patent—Defence to Action for Infringement—Patents and Designs Act*, 1907 (7 *Edw.* 7, *c.* 29), *s.* 38.
The insertion in a licence to work a patented process of a condition requiring the licensee to purchase from the patentee an article not protected by the patent so far as it is required for use in the patented process is null and void under s. 38, sub-s. 1 (*b*), of the Patents and Designs Act, 1907.
The insertion by the patentee in a licence of such a condition is by s. 38, sub-s. 4, available to any person as a defence to an action for infringement of the patent.
So *held* by the Court of Appeal, affirming the decision of Warrington J. SARASON *v.* FRÉNAY C. A. 474

—— Infringement—Discovery—Interrogatories to discover names of manufacturers of infringing articles—Admissibility—Practice – – – – – 129
See DISCOVERY.

—— Infringement of copyright, registered design, trade mark, or patent—Consent to order in chambers—Motion in Court—Costs
See PRACTICE. 2. 576

PATENTS RULES, 1908, rr. 68—74 – – 461
See PATENT. 1.

PAYMENT—Practice—Fund in Court—Payment to one trustee – – – 701
See PRACTICE. 1.

PERPETUITY—*Settlement—Trust for Sale to arise "at the expiration of twenty-one years" from Date thereof.*
By a settlement dated May 13, 1892, the settlor conveyed real estate unto and to the use of two trustees in fee simple upon the trusts thereinafter declared, and it was thereby declared

PERPETUITY—*continued.*

that the two trustees, or the survivor of them or other the trustees or trustee for the time being thereof (thereinafter called the said trustees or trustee), should stand possessed of the said premises during the term of twenty-one years from the date thereof upon trust to apply the rents and profits as therein mentioned, including the payment of an annual sum of 320*l.* on May 13 and November 13 in each year; and it was thereby further declared that the said trustees or trustee should "at the expiration of the said term of twenty-one years" sell the said premises as therein mentioned.

On June 20, 1913, the two trustees named in the settlement, pursuant to the foregoing trust for sale, contracted to sell the real estate to the defendant, who took the objection that the trust for sale was void for remoteness:—

Held that, the determination of the term and the commencement of the trust for sale arising at one and the same moment, the trust was not void for remoteness on the ground that it was limited to take effect "at the expiration" of the term.

Held, also, that according to the true construction of the settlement the term commenced from midnight on May 12, and therefore the trust for sale was not void for remoteness on the ground of exceeding a term of twenty-one years from its creation.

Semble, that if the trust for sale had otherwise been void for remoteness it would not have been saved by the fact that it was being exercised by the two trustees originally named in the settlement. ENGLISH *v.* CLIFF

Warrington J. 376

PETITION—Petition for compulsory licence—Patent—Form of opposition—Grounds stated—Petition referred to the Court—Particulars of grounds of opposition *See* PATENT. 1. **461**

PICTURE—Copyright—Copyright in picture not registered at the commencement of the Copyright Act, 1911—Memorandum of assignment—"Four golfing subjects"—Parol evidence to identify—Offer before action—Right of plaintiff to order—Costs – – – – **566**
See COPYRIGHT. 3.

POLICY HOLDER—Insurance (Life)—Deposit—Life policy—Agreement for employment in life department—Annuity granted in compromise of action for breach of agreement—Charge on deposit – **77**
See INSURANCE (LIFE).

PORT OF LONDON ACT, 1908 – – **362**
See THAMES.

POWER OF APPOINTMENT — *Exercise — Appointment to Object — Condition to pay Annuities to Persons not Objects—Validity of Appointment freed from Condition.*

In cases where a power of appointment is exercised in favour of an object of the power, but conditions in favour of persons who are not objects of the power are imposed on the appointee, the difficulty in deciding the question whether the conditions are to be disregarded or

POWER OF APPOINTMENT—*continued.*

render the appointment itself void is one of fact or of inference rather than of law: the law being that if there is a genuine appointment to an object of the power, coupled with an attempt to impose on the appointment conditions or trusts in favour of persons who are not objects, the appointment stands good free from the conditions, whereas if there is no genuine appointment to an object of the power, but the appointment to that object is made for purposes foreign to the power, then the whole appointment fails, whether the real purposes of the appointment have or have not been communicated to, and assented to by, the nominal appointee.

Under the will of her father a lady had power by will or codicil to appoint that all or any part of the income of certain funds (which was 600*l.* or 700*l.* per annum) should after her death be paid to her husband for life, and upon such conditions and with such restrictions as she should think fit. On her marriage with C. she had settled 3000*l.* of her own upon trust for herself for life and then, in the events which happened, upon such trusts as she should by will or deed appoint. By her will, in exercise of the power under her father's will, she appointed that after her death the income of the funds thereunder should be paid to C. during his life for his absolute use provided he should acquiesce in the several dispositions contained in her will, and so long as he should pay to each of her nieces W. and F. the sum of 50*l.* annually; and she thereby, in exercise of the power under the settlement, appointed that her trustees should out of the settled funds raise and pay her debts, funeral and testamentary expenses, and pecuniary legacies, and pay the residue thereof to her nephews and nieces; and she gave the residue of her personal estate, being her "separate estate or over which" she had any power of disposition or appointment, to C. By a codicil she revoked the appointment under her father's will to C., and instead thereof appointed that the whole of the income of the fund thereunder should be paid to C. during his life for his absolute use, provided that he should acquiesce in her testamentary dispositions and so long as he should pay to each of her nieces W., F., and H. the clear sum of 100*l.* annually. The Court found that the testatrix had a genuine desire to benefit C. by the appointment, and that this desire was the real motive and object of the appointment.

Held, that the appointment to C. was good, and that the conditions imposed on him must be disregarded.

In re Perkins [1893] 1 Ch. 283 and *In re Cohen* [1911] 1 Ch. 37 distinguished. *In re* HOLLAND. HOLLAND *v.* CLAPTON

Sargant, J. 595

—— Bankruptcy—Donee of general testamentary power of appointment—Adjudication — No discharge — Exercise of power—Death of bankrupt—Administration action—Appointed fund—Claim by creditor in the bankruptcy for balance of unsatisfied debts—Lapse of time—Limitation Act, 1623 – **68**
See BANKRUPTCY. 1.

PRACTICE—*Fund in Court—Payment to One Trustee.*

The rule that a trust fund in Court will not be ordered to be paid out to a sole trustee except on the consent of all parties beneficially interested is not an inflexible rule; under special circumstances payment to a sole trustee will be ordered.

A lady, on her marriage in 1890, settled a fund of her own to be held by G., her brother, in trust for herself for life, then for U., her husband, for his life, and on the death of the survivor upon trust for the children of the marriage, and in default of children in trust for the settlor absolutely. G. was empowered, while sole trustee, to invest the fund as he thought fit, but if he ceased to be sole trustee, the fund was to be invested on trust securities. U. deserted the settlor in 1890, and they had not since come together. There were no children of the marriage. The fund being in Court, G. and the settlor petitioned for payment out to G. as sole trustee. U. was not a party to the proceedings. G. undertook that if a child of the marriage was born he would have a second trustee appointed:—

Held, that in these special circumstances the fund must be ordered to be paid out to G., the sole trustee. LEIGH *v.* PANTIN **Sargant J. 701**

2. ——*Judgment—Application for Judgment—Infringement of Copyright, Registered Design, Trade Mark, or Patent—Consent to Order in Chambers—Motion in Court—Costs—Rules of the Supreme Court*, 1883, *Order XXXII., r.* 6.

Where the plaintiff in an action for the infringement of his registered design, or trade mark, or patent, is proceeding to obtain a judgment restraining the infringement, it is desirable that some publicity should be given to the order; and, although the defendant has consented to the order, the plaintiff is entitled to the costs of moving in open Court, and not merely to such costs as would have been incurred by applying by summons in chambers.

Gandy Belt Manufacturing Co. v. *Fleming, Birkby & Goodall* (1901) 18 Rep. Pat. Cas. 276 and *Royal Warrant Holders Association* v. *Kitson* (1909) 26 Rep. Pat. Cas. 157 followed.

London Steam Dyeing Co. v. *Digby* (1885) 36 W. R. 497, *Allen* v. *Oakey* (1890) 62 L. T. 724, and *Slazenger* v. *Pigott* (1895) 12 Rep. Pat. Cas. 439 not followed. J. T. SMITH AND J. E. JONES, LIMITED *v.* SERVICE, REEVE & CO. **Sargant J. 576**

—— Costs.
See under COSTS.

—— Right to sue—One of two churchwardens
See ECCLESIASTICAL LAW. **308**

PRESUMPTION—Landlord and tenant—Lease—Covenant for perpetual renewal—Principle of construction – – **705**
See LANDLORD AND TENANT. 1.

PRIORY—Suppression of Priory—Grant from Crown – – – – – **308**
See ECCLESIASTICAL LAW.

PRIVATE ROAD—Easement—Right of way—Right of access of owner of dominant tenement—Obstruction by gates—Construction of grant – – – **653**
See WAY, RIGHT OF.

PROBATE—Letters of administration, Grant of—Sale of real estate by administratrix—Subsequent discovery of will appointing executors—Revocation of letters of administration—Grant of probate to executors — Validity of purchaser's title – – – – – – **13**
See ADMINISTRATION. 2.

PROCESS—Patent.
See under PATENT.

PUBLIC TRUSTEE.
See under TRUSTEE.

PUBLIC TRUSTEE (FEES) ORDER, 1912, r. 1; Schedule (Division III.) – – **456**
See TRUSTEE.

PURCHASER—Vendor and.
See under VENDOR AND PURCHASER.

QUALIFICATION—Company—Directors – **506**
See COMPANY. 1.

RECEIVER—Land in mortgage—Writ of elegit—Order appointing receiver—Charge, when operative — Payment of rent in advance by tenant—Right of judgment creditor – – – – – **211**
See JUDGMENT CREDITOR.

RECONSTRUCTION—Company.
See under COMPANY.

RECTORY—Perpetual curate – – – **308**
See ECCLESIASTICAL LAW.

RE-ENTRY — Lease — Covenants — Continuing breach—Waiver—Measure of damages
See LANDLORD AND TENANT. 2. **516**

REFLECTING CONTINGENCY — Will — Construction – – – – – **386**
See WILL. 3.

REGISTRY — Ship—Registered ship—Sunk in fairway of canal — Abandonment — "Constructively lost" — Closing of registry—Transfer on sale—Mode of conveyance—Bill of sale – – **199**
See SHIPPING.

REGISTRY ACTS—*Yorkshire—Land Settled in Trust for Sale—Mortgage of Proceeds of Sale—Registrability—Yorkshire Registries Act*, 1884 (47 & 48 *Vict. c.* 54), *ss.* 4, 14—*Erroneous Representation by Mortgagor to Mortgagees as to Land included in Settlement—Subsequent Acquisition of Land by Mortgagor—Subsequent Mortgagee with Notice—Registered Mortgage—Equitable Estoppel.*

A mortgage of an interest in the proceeds of sale of land in Yorkshire held in trust for sale is not registrable under the Yorkshire Registries Act, 1884, and consequently the priorities of successive mortgages are determined by the dates of notices to the trustees.

Principle of *Arden* v. *Arden* (1885) 29 Ch. D. 702 applied.

By erroneously representing that a registered

REGISTRY ACTS—*continued.*

settlement by way of trust for sale of land in Yorkshire included a certain freehold house a beneficiary obtained a loan from the plaintiffs on mortgage of her interest under the settlement.

The plaintiffs gave notice to the trustees, but did not register their mortgage.

The beneficiary, having subsequently acquired the house as heir-at-law to the deceased owner, mortgaged it to F. and B., who had full notice of the plaintiffs' claim thereon and of the representations on which they had relied, but considered that their claim was not well founded.

This mortgage was duly registered:—

Held, that the beneficiary and F. and B., her assigns with notice, were as against the plaintiffs bound by equitable estoppel to treat the house as included in the settlement and subject to the trust for sale thereunder, so that, although the plaintiffs' mortgage was not registrable in respect of the house, no priority was acquired by the registration of the subsequent mortgage.

Bloomenthal v. *Ford* [1897] A. C. 156; *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1873) L. R. 6 H. L. 352; and *In re Bridgwater's Settlement* [1910] 2 Ch. 342 applied. GRESHAM LIFE ASSURANCE SOCIETY *v.* CROWTHER – **Astbury J. 219**

REMAINDERMAN—Tenant for life and.
See under TENANT FOR LIFE AND REMAINDERMAN.

REMOTENESS—Perpetuity – – – **376**
See PERPETUITY.

RENEWAL — Lease — Covenant for perpetual renewal — Principle of construction — Presumption – – – – **705**
See LANDLORD AND TENANT. 1.

RENT — Land in mortgage—Writ of elegit—Order appointing receiver — Charge, when operative—Payment of rent in advance by tenant—Right of judgment creditor – – – – – **211**
See JUDGMENT CREDITOR.

—— Licensed premises—Lease by tenant for life—Charges under Licensing Acts—Reservation of "best rent that can reasonably be obtained" – – **353**
See SETTLED LAND. 1.

—— Revenue—Licensed premises—Increase of duty—Lease—Liability of grantor of lease to pay proportion of increase—"Grantor of lease"—Person in receipt of rents – – – – – **283**
See REVENUE. 1.

REPAIRS — Lease — Covenants — Continuing breach—Waiver—Re-entry—Measure of damages – – – – – **516**
See LANDLORD AND TENANT. 2.

RESCISSION — Company—Directors—Fiduciary position—Contract with another company in which a director holds shares
See COMPANY. 2. **488**

RESTAURANT — Water — Supply — Option of Board to supply by meter—Domestic purposes—Trade or manufacturing purpose – – – – – – **734**
See WATER. 2.

RESTRAINT OF TRADE — *Covenant—Reasonable Protection of Covenantee—Severability of Covenant — Procuring Breach of Covenant — Cause of Action—Damages—Proof of Damage—Damages inferred—General Observations on the Present State of the Law relating to Covenants in Restraint of Trade.*

At the date of the covenant hereinafter mentioned the plaintiff Goldsoll carried on business as a dealer in imitation jewellery at 7, Old Bond Street, under the name of Tecla, and Terisa, Limited, a company in which the defendant Goldman held substantially all the shares and all the debentures, carried on a similar business at 8, New Bond Street. The plaintiff carried on, or was interested in, similar businesses, under the name of Tecla, in Paris, New York, Vienna, Berlin, and other cities.

In June, 1912, the plaintiff Goldsoll and the defendant Goldman entered into an agreement for the purpose of putting an end to competition between them, whereby Goldman agreed to discontinue the business of the Terisa Company, and not allow the name Terisa to be used in a similar business for two years from October 22, 1912; and covenanted that he would not for the like period "either solely or jointly with or as agent or employé for any other person persons or company directly or indirectly carry on or be engaged concerned or interested in or render services gratuitously or otherwise to the business of a dealer in real or imitation jewellery in the county of London or any part of the United Kingdom of Great Britain and Ireland and the Isle of Man or in France, the United States, Russia, or Spain, or within twenty-five miles of Potsdamerstrasse, Berlin, or St. Stefans Kirche, Vienna."

Goldsoll and the London Tecla Gem Company, Limited, a company to whom Goldsoll had transferred his business, brought this action against Goldman, Sessel, a former manager of the Terisa Company, and S. Sessel & Co., a company under whose name Sessel and his wife had started an imitation jewellery business at 14, New Bond Street, for injunctions against Goldman, restraining breaches of his covenant, and against the other defendants restraining them from procuring and inducing such breaches:—

Held, on the facts, that Goldman had committed breaches of his covenant, and that the defendants Sessel and S. Sessel & Co. had induced him to break his contract.

Held, also, (1.) that the covenant was not too wide because it extended to real jewellery, though the plaintiff's business was chiefly if not entirely confined to imitation jewellery. (2.) That the covenant was too wide in area unless severable; but that the covenant not to carry on business in the United Kingdom or the Isle of Man was severable from the rest, and was not too wide. (3.) That damages are essential to the right of action which a covenantee

RESTRAINT OF TRADE—*continued.*

has against one who induces his covenantor to break his contract, but that there was sufficient evidence of damages. (4.) In a case where the breach which has been procured would in the ordinary course inflict damage on the plaintiff, the plaintiff may succeed without proof of particular damage. GOLDSOLL *v.* GOLDMAN
Neville J. 603

RESTRICTIVE COVENANT.
See under COVENANT.

RESTRICTIVE STIPULATIONS — Power reserved to "vendor" to vary stipulations —Vendor and purchaser — Building scheme—Sale subject to stipulations— —Sub-sales subject to stipulations— "Vendor"—Release of stipulations by original vendor—Rights of purchasers and sub-purchasers – – – **555**
See VENDOR AND PURCHASER. 1.

RESULTING TRUST—Fund raised by subscription for special object—Unapplied surplus—Resulting trust for subscribers
See TRUST. **419**

RETAINER — *Right of Retainer—Covenant to pay Sum to Trustees of Marriage Settlement—Statute-barred Debt—Cestui que Trust of Debt one of several Legal Personal Representatives of Covenantor—Claim of Trustees of Settlement.*

By his marriage settlement a husband covenanted to pay a sum of 3000*l.* to the trustees to be held upon the trusts of the funds thereby settled. There was only one child of the marriage, a daughter, who under the trusts of the settlement became absolutely entitled on her mother's death to the settled funds. By his will the husband appointed his wife his sole executrix and residuary legatee and directed payment of the 3000*l.* to the trustees. He died in 1883 and his widow proved his will, but the 3000*l.* was never paid. By her will the widow appointed her daughter and three other persons her executors and bequeathed to her daughter a legacy of 50,000*l.* and a life interest in her residuary estate. The widow died in 1912, and the daughter, as one of her legal personal representatives and as being beneficially entitled to the 3000*l.*, claimed a right to retain the same out of her mother's assets. It was admitted that so far as the trustees of the settlement were concerned the debt under the covenant was barred :—

Held, that the inability of an executor to sue himself, which was the foundation of the right of retainer, did not exist in the present case inasmuch as the debt was due, if at all, to the marriage settlement trustees and not to the daughter, whose only right, if any, was to sue the trustees, and that the daughter was not entitled to retain the 3000*l.*

Cockroft v. *Black* (1725) 2 P. Wms. 298 distinguished. *In re* MARY CAROLINE, DOWAGER DUCHESS OF SUTHERLAND. MICHELL *v.* COUNTESS BUBNA – – **Joyce J. 720**

—— Executor's right of retainer — Right to retain against specialty creditors – **395**
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REVENUE — *Licensed Premises — Increase of Duty—Lease—Liability of Grantor of Lease to pay Proportion of Increase—"Grantor of Lease" —Person in receipt of Rents—Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 46—*Finance Act*, 1912 (2 *& 3 Geo.* 5, *c.* 8), *s.* 2.

Sect. 2 of the Finance Act, 1912, provides that where licensed premises are held under a lease made before the passing of the Finance (1909-10) Act, 1910, which does not contain any covenant by the lessee to obtain a supply of intoxicating liquor from "the grantor of the lease," the lessee shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from, or deduct from any sum due to, "the grantor of such lease" a proportion of any increase of duty payable in respect of the licence under the Finance (1909-10) Act, 1910 :—

Held, that the words "grantor of the lease" must be read in their strict sense as meaning the original grantor of the lease and do not include a person who was for the time being in receipt of the rent of the demised premises. BODEGA COMPANY, LIMITED *v.* READ
Warrington J. 283

2. —— *Licensed Premises—Increase of Duty —Lease—Liability of Grantor of Lease to pay Proportion of Increase—"Grantor of Lease"— Person in receipt of Rents—Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 46—*Finance Act*, 1912 (2 *& 3 Geo.* 5, *c.* 8), *s.* 2.

Sect. 2 of the Finance Act, 1912, provides that where licensed premises are held under a lease made before the passing of the Finance (1909-10) Act, 1910, which does not contain any covenant by the lessee to obtain a supply of intoxicating liquor from "the grantor of the lease" the lessee shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from, or deduct from any sum due to, "the grantor of such lease" a proportion of any increase of duty payable in respect of the licence under the Finance (1909-10) Act, 1910 :—

Held, affirming the decision of Warrington J. [1914] 2 Ch. 283, that the words "grantor of the lease" must be read in their strict sense as meaning the original grantor of the lease and do not include a person who was for the time being in receipt of the rent of the demised premises. BODEGA COMPANY, LIMITED *v.* READ – – – – – **C. A. 757**

—— Will—Construction—Trust for sale and conversion—Direction to trustees to pay "all death duties" out of residue —Previous settlement on daughter's marriage — Settlement estate duty — Succession duty – – – **413**
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REVOCATION—Letters of administration – **13**
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RIGHT OF RETAINER.
See under RETAINER.

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See under THAMES.

ROAD—Private road—Easement—Right of way—Right of access of owner of dominant tenant—Obstruction by gates—Construction of grant – – – 653
See WAY, RIGHT OF.

ROUNDABOUTS AND SHOWS—"Fair"—Injury to herbage—Injunction—Measure of damages – – – – – 293
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See PATENT. 1.

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See COSTS.

SALE—Letters of administration, Grant of—Sale of real estate by administratrix—Subsequent discovery of will appointing executors—Revocation of letters of administration—Grant of probate to executors—Validity of purchaser's title
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—— Perpetuity—Settlement—Trust for sale to arise "at the expiration of twenty-one years" from date thereof – – 376
See PERPETUITY.

—— Ship—Registered ship—Sunk in fairway of canal—Abandonment—"Constructively lost"—Closing of registry—Transfer on sale—Mode of conveyance—Bill of sale
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SCHEME OF ARRANGEMENT—Insurance of debentures—Re-insurance—Contract of indemnity—Liquidation—Limit of liability of re-insurer – – – 617
See INSURANCE (DEBENTURES).

SECURED CREDITOR—Bankruptcy—Mutual dealings – – – – – 438
See BANKRUPTCY. 2.

SECURITIES—"Standing in my name"—Will—Construction—Specific bequest—Foreign Government bonds to bearer—Custody of testatrix's bankers – 115
See WILL. 9.

SET-OFF—Bankruptcy—Mutual dealings—Insolvent company—Winding-up—Secured creditor—Mortgage of chattels—Insurance in creditor's name—Receipt of insurance money before winding-up—Surplus over secured debt—Set-off against unsecured debt – – 438
See BANKRUPTCY. 2.

SETTLED ESTATE—Tenant for life and remainderman.
See under TENANT FOR LIFE AND REMAINDERMAN.

SETTLED LAND—*Licensed Premises—Lease by Tenant for Life—Charges under Licensing Act—Compensation Fund—Deduction from Rent—Statutory Provision against contracting out—Covenant by Lessees to pay Rent without Deduction—Covenant to pay Charges—Reservation of "best rent that can reasonably be obtained"—Consideration for Grant of Lease—Settled Land Act*, 1882 (45 *&* 46 *Vict. c.* 38), *s.* 6; *s.* 7, *sub-ss.* 2, 3; *ss.* 53, 54—*Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 3, *sub-ss.* 1, 3—*Licensing (Consolidation) Act*, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 21, *sub-ss.* 1, 3.

By s. 3, sub-s. 3, of the Licensing Act, 1904, and s. 21, sub-s. 3, of the Licensing (Consolidation) Act, 1910, it was provided that deductions from rent in respect of compensation fund charges imposed upon licensed premises "may, notwithstanding any agreement to the contrary," be made by any licence-holder paying a charge under those sections.

In 1905 the defendants, a brewery company, who were lessees of licensed premises at a yearly rent of 150*l.* under a lease for fourteen years from June 24, 1902, granted under the Settled Land Act, 1882, by a previous tenant for life, deducted from their rent the compensation fund charges levied under the provisions of the Licensing Act, 1904. The tenant for life, who was an illiterate man, complained of the deductions and the defendants subsequently agreed that if he granted them a new lease for twenty-one years at the same rent of 150*l.* they would pay the charges themselves. Accordingly, the tenant for life, without having any legal assistance or consulting the solicitor to the settled trust estate, in exercise of his statutory powers granted the defendants a new lease of the licensed premises for twenty-one years at a yearly rent of 150*l.*, and the defendants covenanted to pay the rent without deduction, and also to pay all rates, taxes, assessments and charges, including all payments to the compensation fund under the Licensing Act, 1904, which then were or during the term should be charged on the demised premises without making any deduction from rent in respect thereof. The defendants had paid the charges under the Licensing Act in fulfilment of their promise.

In an action by the remaindermen against the defendants for a declaration that the lease did not reserve the best rent that could reasonably be obtained, and was not binding upon them:—

Held, that there was no valid reservation in the lease of the real amount which was to be paid for the use of the premises; that the rent which was really reserved was 150*l.* subject to the deductions, and no more, and was obviously, in the circumstances, not the best rent that could be obtained; and that therefore the new lease was not a valid lease under the provisions of the Settled Land Act, 1882, so as to be binding upon the remaindermen. PUMFORD *v.* W. BUTLER & CO., LIMITED – – Joyce J. 353

SETTLED LAND—*continued.*

2. —— *Limited Owners with Powers of Life Tenant—Executors of Deceased Owner—Beneficially entitled—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 5; *s.* 58, *sub-s.* 1 (*v.*), (*ix.*).

Persons beneficially entitled under a settlement to the income arising from real estate until the death of the last survivor of them and the executors of a deceased person similarly entitled are together persons having the powers of a tenant for life under the Settled Land Act, 1882, s. 58, sub-s. 1 (ix.).

Vine v. *Raleigh* [1896] 1 Ch. 37 followed.

In re Jemmett and Guest's Contract [1907] 1 Ch. 629 explained and distinguished. *In re* JOHNSON. JOHNSON *v.* JOHNSON

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SETTLEMENT—Perpetuity—Trust for sale to arise "at the expiration of twenty-one years" from the date thereof – **376**
See PERPETUITY.

—— Retainer—Right of retainer—Covenant to pay sum to trustees of marriage settlement—Statute-barred debt—Cestui que trust of debt one of several legal personal representatives of covenantor—Claim of trustees of settlement – – **720**
See RETAINER.

SETTLEMENT ESTATE DUTY.
See under REVENUE.

"**SHALL**" — Will — Construction — Words of futurity—Gift to children of child of testator "who shall die in my lifetime"
See WILL. 12. **61**

SHARES—Company.
See under COMPANY.

SHIPPING—*Registered Ship—Sunk in Fairway of Canal—Abandonment*—"*Constructively lost*"—*Closing of Registry—Transfer on Sale—Mode of Conveyance—Bill of Sale—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 21, 24, 530—*Merchant Shipping Act*, 1906 (6 *Edw.* 7, *c.* 48), *s.* 52, *sub-s.* 1.

By s. 21 of the Merchant Shipping Act, 1894, as amended by s. 52 of the Merchant Shipping Act, 1906, in the event of a registered ship being either "actually or constructively lost" the owner shall immediately on obtaining knowledge of the event, if no notice thereof has already been given to the registrar, give notice thereof to the registrar, who shall make an entry thereof in the register book, and the registry of the ship in that book shall be considered as closed. The expression "constructively lost" has no meaning as applied to a ship, except in connection with marine insurance, and a vessel which is a constructive total loss within the meaning of the term in marine insurance is "constructively lost" within the meaning of the above section.

On March 22, 1913, a ship of 350 tons gross measurement was sunk in the fairway of the Manchester Ship Canal and abandoned by the owners to the underwriters, who paid as on a total loss. The canal company, acting under s. 530 of the Merchant Shipping Act, 1894, raised the vessel at a cost of 3600*l.* and removed her to a pontoon at Manchester, where on May 1, 1913, they sold her by auction to the defendant for 1675*l.* The contract of sale described the vessel as a "registered ship" of a certain tonnage, and provided that on completion the seller would deliver to the purchaser a delivery order for the vessel. On May 8, the day fixed for completion, the defendant required the canal company to transfer the ship by bill of sale on the ground that she was still a registered ship. On May 22 the canal company offered to execute a bill of sale quantum valeat, but the registry having in the meantime been closed, the defendant declined to complete the purchase. In an action for specific performance of the contract:—

Held, that the ship was "constructively lost" within the meaning of s. 21 of the Act of 1894, and by the operation of that section as amended by the Act of 1906, the ship having ceased to be a registered ship, no bill of sale was necessary to transfer her to the defendant. The canal company had a statutory right to sell the ship whether the registry was closed or not, and as, before action brought, they had offered to execute a bill of sale for what it was worth, the defendant was bound to complete his contract.

Decision of Eve J. [1914] 1 Ch. 453 reversed.
MANCHESTER SHIP CANAL COMPANY *v.* HORLOCK – – – – – – **C. A. 199**

SHOWS—Roundabouts and—"Fair"—Injury to herbage—Injunction—Measure of damages – – – – – **293**
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SONG—Copyright—Literary work—"First published"—"Issue of copies to the public"—Simultaneous publication abroad—Colourable imitation—Reply song—Infringement—Injunction – – **728**
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SPECIALTY CREDITORS—Executor's right of retainer—Debt arising from breach of trust by testator — Right to retain against specialty creditors – **395**
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SPECIFIC BEQUEST — Will — Construction — Securities "standing in my name"—Foreign Government bonds to bearer—Custody of testatrix's bankers – **115**
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SPECIFIC PERFORMANCE — Contract — Enjoyment of light—Agreement that light enjoyed by licence—Non-disclosure—Forcing doubtful title on purchaser—Doubt if agreement binds land – **538**
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14 Geo. 3, c. cv., ss. 1, 3, 4—6, 7, 8, 10—*Town Moor* – – – – – **293**
See TOWN MOOR.

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1 & 2 Vict. c. 110, s. 13—*Judgments* – – **211**
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8 Edw. 7, c. 69, ss. 9, 24—*Companies* (*Consolidation*) – – – – – 430
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9 Edw. 7, c. 44, s. 46; Sched. II.—*Housing, Town Planning, &c.* – – – 686
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TENANT FOR LIFE—Settled land.
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—— Tenant for life and remainderman.
See under TENANT FOR LIFE AND REMAINDERMAN.

TENANT FOR LIFE AND REMAINDERMAN—*Enjoyment of Income in Specie—Trust for Sale and Conversion—Full Power and Discretion to postpone—Trust Premises "constituting or representing" Residuary Estate—Appropriation of Shares.*

Testator, who died in 1913, gave his real and personal estate to trustees on trust for sale and conversion, with the fullest power and discretion to postpone the sale or conversion of the whole or any part thereof during such period as they should think proper, and to invest the

TENANT FOR LIFE AND REMAINDERMAN —*continued.*

proceeds in manner thereby authorized; and declared that the trustees should "divide the trust premises constituting or representing" his residuary estate into as many shares as he should leave children who should survive him or have died in his lifetime leaving children who should survive him, and should appropriate one of such shares to each such child on trust to pay the income unto each such child during his or her life with remainder on trusts in favour of his or her children. The testator's estate at the date of his death comprised some small leasehold properties and divers investments which were not authorized by the will but which had not yet been sold or converted by the trustees. No appropriation of the children's shares had yet been made:—

Held that, as between tenants for life and remaindermen, the tenants for life were entitled to receive the whole of the income of the residuary estate in its actual state of investment including the income of any unauthorized investments, whether wasting or permanent, retained by the trustees under their discretionary power to postpone sale and conversion. *In re Thomas* [1891] 3 Ch. 482 followed. *In re* GODFREE. GODFREE *v.* GODFREE.

Warrington J. 110

THAMES—*River Thames—Drainage of Metropolis—London County Council—Powers—Construction of Works "in, over, or under" Bed of Thames—Port of London Authority—Approval — Licence — Interference with Navigation — Metropolis Management Act*, 1855 (18 *&* 19 *Vict. c.* 120), *s.* 135—*Metropolis Management Amendment Act*, 1858 (21 *&* 22 *Vict. c.* 104), *s.* 28—*Thames Conservancy Act*, 1894 (57 *&* 58 *Vict. c. clxxxvii.*)—*Port of London Act*, 1908 (8 *Edw.* 7, *c.* 68).

By s. 135 of the Metropolis Management Act, 1855, the Metropolitan Board of Works, to whose powers and obligations the London County Council have now succeeded, were required to make such sewers as they might think necessary for preventing all or any part of the sewage of the metropolis from flowing or passing into the river Thames in or near the metropolis and to cause such sewers and works to be completed on or before December 31, 1860, and also to make all such other sewers and works and such diversions or alterations of any existing sewers or works vested in them under that Act as they might from time to time think necessary for the effectual sewerage and drainage of the metropolis.

By s. 28 of the Metropolis Management Amendment Act, 1858, "In order to preserve the navigation of the river Thames, the plans of any work to be constructed under the authority of this Act upon the banks, bed, or shore of the river Thames, which may interfere with the free navigation of the said river, shall be approved by the conservators of the river Thames, in writing signed by their secretary, before such works are commenced, certifying that the works according to such plans will not interfere with the navigation of the river Thames":—

THAMES—*continued.*

Held, that s. 28 of the Act of 1858 was a subsisting enactment.

Held, therefore, that the London County Council were entitled by virtue of the Acts of 1855 and 1858 to construct works in, over, or under the bed of the river Thames, and that the Port of London Authority, who had succeeded to the powers and obligations of the conservators of the river Thames, were bound to consider, pursuant to s. 28 of the Act of 1858, any plans of works which might be submitted to them by the London County Council, and if they were of opinion that such works or any of them would not interfere with the navigation of the river Thames to approve the plans for the same and give their certificate accordingly, and that as to any works the plans of which might have been so approved and as to which the certificate above mentioned had been given, the London County Council were not bound to obtain any further licence from the Port of London Authority. LONDON COUNTY COUNCIL *v.* PORT OF LONDON AUTHORITY – – – **Warrington J. 362**

THAMES CONSERVANCY ACT, 1894. – **362**
See THAMES.

TIME—Limitations, Statute of.
See under LIMITATIONS, STATUTE OF.

TITLE—Vendor and purchaser.
See under VENDOR AND PURCHASER.

TOWN MOOR—*Freemen's Right to depasture Cattle on Moor—Stint Tickets—Transferees of Stint Tickets—Temperance Festival on Moor—Roundabouts and Shows—"Fair"—Injury to Herbage—Injunction—Measure of Damages—Town Moor Act*, 1774 (14 *Geo.* 3, *c. cv.*), *ss.* 1, 3, 4—6, 7, 8, 10—*Newcastle-upon-Tyne Improvement Act*, 1870 (33 *&* 34 *Vict. c. cxx.*), *ss.* 6, 7, 8, 11, 12, 17, 19.

By special Acts of 1774 and 1870 the right of resident freemen and widows of resident freemen of the town of Newcastle-upon-Tyne to depasture two milch cows each on the Town Moor was established and regulated, the number of cows to be depastured in any one year on the moor being limited to 800, and every freeman and widow of a freeman was entitled in April of each year on application to their stewards and wardens to a stint ticket for two milch cows to be depastured on the moor, which was transferable to any resident inhabitant of the town, but no person was to hold more than ten such tickets. In 1912 the area of the moor available for pasturage was insufficient to carry the statutory number of cows.

The Act of 1774 authorized the corporation at the request of the stewards and wardens from time to time to grant leases of parts of the Town Moor for the purpose of improving the same, but s. 7 enacted that no lease should be granted of that part of the Town Moor called the Cowhill and such part adjoining the same as should be necessary for holding the Cowhill fairs, nor of another part of the moor called the Race ground, nor of any part of the moor where any booths, stalls, and other erections had been set up during the holding of the said fairs or

TOWN MOOR—*continued.*

horse races, but the same should be preserved for fairs and horse races as theretofore. The Act of 1870 (s. 6) constituted a committee of the stewards and wardens, to be elected annually, to act for the stewards and wardens and for the freemen and widows of freemen for all purposes relating to the Town Moor, and (s. 8) authorized the committee and the corporation from time to time to enter into agreements for the appropriation of parts of the Town Moor for not exceeding ten days at a time for agricultural shows or other public purposes.

Prior to 1882 horse races with attendant roundabouts and shows had for many years been held on the race ground on the Town Moor, but in that year they were and ever since had been held elsewhere. From 1882 down to 1912 a temperance festival was annually held on the old race ground on the moor with the joint consent of the committee and of the corporation, by whom various persons, including the defendants, were from time to time licensed to bring roundabouts and shows, and it had grown into a gathering of many thousands of people. In 1912 the heavy traction engines used by the defendants cut up the surface of the moor and seriously damaged the herbage; consequently, in 1913 the committee, while consenting to the festival being held as usual on the moor, declined to join with the corporation in granting a licence to the defendants. The corporation nevertheless granted the defendants a licence, and damage ensued to the herbage. Most of the holders of stint tickets for the years 1912 and 1913 were not freemen but persons who had purchased tickets from freemen. In an action by the committee against the defendants for an injunction to restrain them from bringing their roundabouts and shows on to the moor, and for damages, the corporation not being parties to the action :—

Held, that neither the horse races nor the temperance festivals with the attendant roundabouts and shows were a fair within the meaning of s. 7 of the Act of 1774, and that the corporation had no power under either of the Acts to grant the licence to the defendants without the consent of the plaintiffs, and an injunction granted accordingly.

Held, also, that the measure of damages was the amount of injury to the herbage, irrespective of whether the stint ticket holders were or were not freemen, it being the duty of the plaintiffs to protect and improve the moor. WALKER *v.* MURPHY – – **Neville J. 293**

TOWN MOOR ACT, 1774, ss. 1,3,4–6, 7, 8, 10
See TOWN MOOR. **293**

TRADE—Restraint of.
See under RESTRAINT OF TRADE.

TRADE MARK—*Invented Word*—"*Parlograph*"—*Word sufficiently referring to Origin of Goods*—*Trade Marks Act*, 1905 (5 *Edw. 7, c.* 15), *ss.* 3, 9.

A word which is an "invented word" within the meaning of head (3.) of s. 9 of the Trade Marks Act, 1905, may be registered as a trade mark, although it has "direct reference to the character or quality of the goods" within head (4.) of that section—the law in this respect being the same as that laid down in *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs, and Trade Marks* [1898] A. C. 571, with reference to corresponding provisions of the Patents, Designs, and Trade Marks Acts, 1883 and 1888.

The word "Parlograph" is capable of registration as a trade mark under class 8 in respect of sound-recording and reproducing machines and parts and accessories thereof.

A German company, which had already registered the word "Parlograph" as its trade mark in several foreign countries, in connection with sound-recording and reproducing machines and the like, applied for registration of the word as its trade mark in England. A pamphlet was in evidence (issued by an English company which was the sole agent in the United Kingdom for sale of the German company's goods) which described, under the name "Parlograph," a sound-recording machine thereby offered for sale in the United Kingdom :—

Held, that the word sufficiently indicated that it was to be used in connection with articles produced by the applicants to come within the definition of "trade mark" in s. 3 of the Act of 1905.

In re Gramophone Co.'s Application [1910] 2 Ch. 423 distinguished. *In re* CARL LINDSTROEM AKTIENGESELLSCHAFT'S TRADE MARK **Sargant J. 103**

—— Infringement of copyright, registered design, trade mark, or patent—Practice—Judgment — Application for judgment — Consent to order in chambers—Motion in Court—Costs– – – – **576**
See PRACTICE. 2.

TRUST — *Resulting Trust — Fund raised by Subscription for Special Object — Unapplied Surplus — Resulting Trust for Subscribers — Rule in Clayton's Case.*

A fund was raised by subscription for the assistance of the sick and wounded in the Balkan war.

Subscriptions came in from time to time and the fund was duly applied by the trustees from time to time during the war.

At the close of the war there was an unexpended balance in the trustees' hands which admittedly belonged to some or all of the subscribers by way of resulting trust :—

Held, that the rule in *Clayton's Case* (1816) 1 Mer. 572, 608, was inapplicable, and that the balance belonged to all the subscribers rateably in proportion to their subscriptions, irrespective of date. *In re* BRITISH RED CROSS BALKAN FUND. BRITISH RED CROSS SOCIETY *v.* JOHNSON – – – – – **Astbury J. 419**

—— Charitable trust.
See under CHARITY.

—— Perpetuity—Settlement — Trust for sale to arise "at the expiration of twenty-one years" from date thereof – – **376**
See PERPETUITY.

TRUST—*continued.*

—— Sale and conversion, Trust for—Tenant for life and remainderman—Enjoyment of income in specie—Full power and discretion to postpone — Trust premises "constituting or representing" residuary estate—Appropriation of shares **110**

See TENANT FOR LIFE AND REMAINDERMAN.

TRUSTEE—*Public Trustee—Income Fee—Incidence—Life Annuities—Public Trustee Act*, 1906 (6 *Edw.* 7, *c.* 55), *ss.* 9, 15—*Public Trustee* (*Fees*) *Order*, 1912, *r.* 1; *Schedule* (*Division III.*).

The income fee payable to the Public Trustee in respect of life annuities bequeathed by a will is payable out of those annuities and not out of residue. *In re* BENTLEY. PUBLIC TRUSTEE *v.* BENTLEY – – – – **Astbury J. 456**

—— Executor.
See under EXECUTOR.

—— Executor's right of retainer—Debt arising from breach of trust by testator—Right to retain against specialty creditors **395**
See ADMINISTRATION. 1.

—— Payment to one trustee—Practice—Fund in Court – – – – – **701**
See PRACTICE. 1.

—— Retainer, Right of—Covenant to pay sum to trustees of marriage settlement—Statute-barred debt – – – **720**
See RETAINER.

UNDUE PREFERENCE—Electric lighting **251**
See ELECTRIC LIGHTING.

VENDOR AND PURCHASER—*Building Scheme—Restrictive Stipulations—Power reserved to "Vendor" to vary Stipulations—Sale subject to Stipulations—Sub-sales subject to Stipulations—"Vendor"—Release of Stipulations by original Vendor—Rights of Purchasers and Sub-purchasers.*

W., the owner of an estate, laid it out for building subject to seventeen stipulations, of which the eighth provided that the houses to be erected on the estate should be of uniform elevation in accordance with drawings to be approved by "the vendor's" surveyor; the eleventh provided that no trade or business of any kind should be carried on upon any lot except those marked "shop lots"; and the sixteenth reserved to the "vendor" the right of allowing a departure from the stipulations in any one or more cases.

In 1895 W. sold and conveyed several lots of the estate (none of which were "shop lots") to the plaintiff subject to seventeen scheduled stipulations, which were identical with the original stipulations, and the plaintiff covenanted to perform and observe the scheduled stipulations. In 1898 the plaintiff sold and conveyed six of the lots he had purchased to G. subject to seventeen stipulations scheduled to G.'s conveyance, which were identical with the original stipulations, and G. covenanted to observe and perform the scheduled stipulations. In 1910 G.'s successors in title sold and conveyed one of the six lots to the predecessors in title of P. subject to the stipulations scheduled to the deeds of 1895 and 1898 so far as then subsisting.

W. was a party to the deed of 1910, and for valuable consideration released the lot thereby conveyed from the eighth stipulation with liberty to build on it as if it were a "shop lot," and in 1913 this lot was sold and conveyed to P., who, with W.'s approval, built a motor garage upon it, and his tenant commenced to carry on business there. In an action by the plaintiff against P. and his tenant, alleging that the word "vendor" in the stipulations scheduled to the conveyance of 1898 meant the plaintiff and not W., that the defendants had without his (the plaintiff's) consent committed a breach of the eighth and eleventh stipulations, and claiming an injunction :—

Held, that the word "vendor" in the stipulations scheduled to the conveyance of 1898 meant W. and not the plaintiff; and that, W. having under the sixteenth stipulation released the defendant's land from the eleventh stipulation, the plaintiff had no cause of action. MAYNER *v.* PAYNE – – – **Neville J. 555**

2.——*Contract — Enjoyment of Light — Agreement that Light enjoyed by Licence — Non-disclosure—Specific Performance—Forcing Doubtful Title on Purchaser—Doubt if Agreement binds Land.*

A contract to sell buildings described by a plan which shews windows does not imply any warranty of a legal right to the access of light to those windows.

The existence of an agreement which prevents the statutory period of prescription beginning to run does not create an incumbrance on the property, and the non-disclosure of such an agreement does not invalidate the contract. A clause in such an agreement that the owner of the buildings will block up the windows is an affirmative covenant only and cannot be enforced against subsequent purchasers under the doctrine of *Tulk* v. *Moxhay* (1848) 2 Ph. 774.

A further clause in such an agreement that the adjoining owner may enter and build up the windows in default of the owner of the buildings doing so is a mere revocable licence and does not give the adjoining owner any interest in the land, and if it did give such an interest it would be void for perpetuity.

None of the points mentioned above make the title too doubtful to be forced upon a purchaser.

Greenhalgh v. *Brindley* [1901] 2 Ch. 324, *Haywood* v. *Brunswick Permanent Benefit Building Society* (1881) 8 Q. B. D. 403, and *Alexander* v. *Mills* (1870) L. R. 6 Ch. 124 followed and applied.

Decision of Astbury J. reversed. SMITH *v.* COLBOURNE – – – – **C. A. 538**

3. —— *Contract for Sale of Land—Restrictive Stipulation for Benefit of Adjoining Lands of Vendor—Adjoining Lands sold before Com-*

VENDOR AND PURCHASER—*continued.*

pletion of Contract—Covenant running with the Land—Contract superseded by Conveyance.

In December, 1898, the owner in fee of an hotel agreed to sell it to H., the predecessor in title of the plaintiffs. The contract provided that the conveyance should contain a covenant by H. restrictive of the user of the hotel for the benefit of adjoining houses and lands of which the vendor was owner in fee but under a different title. It was a residential neighbourhood, but the contract was no part of a building scheme. The purchase was completed in December, 1899, and the conveyance contained a covenant by H. in the terms of the restrictive stipulation with the executors of the vendor, who had died.

Between the date of H.'s contract and the date of completion all the vendor's houses and lands adjoining the hotel were put up for sale by public auction in lots subject to conditions of sale which made no reference to H.'s contract or to the restrictive stipulation. All the lots were sold and conveyed to various purchasers before December, 1899.

In December, 1912, the plaintiffs sold the hotel to the defendant free from restrictions, knowing that he proposed to erect a music hall on part of the hotel premises. The defendant refused to complete on the ground that the hotel was bound by the restrictive stipulation in H.'s contract and conveyance, and that the erection of a music hall might be a breach of the covenant. In an action for specific performance :—

Held (affirming the decision of Neville J. [1914] 1 Ch. 34), that the material date was not the date of the agreement of December, 1898, but the date of the conveyance of December, 1899 ; that, as the vendor at that date had no property to which the benefit of the restrictive covenant could attach, the hotel was not subject to any restrictive stipulation ; that the agreement was superseded by the conveyance ; and, on the construction of the conveyance, that there was no restrictive covenant running with the land. MILLBOURN *v.* LYONS - - **C. A. 231**

—— Letters of administration, Grant of—Sale of real estate by administratrix—Subsequent discovery of will appointing executors—Revocation of letters of administration — Grant of probate to executors — Validity of purchaser's title - - - - - - **13**
See ADMINISTRATION. 2.

VOLUNTARY CONTRIBUTIONS—Charity **154**
See CHARITY. 2.

WAIVER — Lease — Covenants — Continuing breach—Re-entry—Measure of damages
See LANDLORD AND TENANT. 2. **516**

WATER—*Water Authority—Covenant to supply Farmhouse and Farm Buildings free of Charge—Covenant running with the Land—Severable Covenant—Farmhouse altered and enlarged—No Increased User of Water for Domestic Purposes—Covenant as to Farmhouse discharged—Washing Motor Cars in Farmyard—Local Government.*

In 1905 the plaintiffs as the local water authority covenanted for valuable consideration with the owner of a farm called C. Farm in their district to lay a pipe to the farmhouse and to erect a standpipe at the farm buildings and to supply a reasonable quantity of water to the farmhouse and buildings free of charge. In 1911 the defendant, having become the owner, altered and enlarged the farmhouse into a residential mansion with a garage for motor cars at the farm buildings, and claimed under the covenant to have a free supply of water to the house and the farm buildings, and to use the water from the standpipe to wash his motor cars. It was conceded that the covenant ran with the land :—

Held, that the covenant was to supply a farmhouse, and that C. Farm having ceased to be a farmhouse, the covenant as to the farmhouse was discharged.

Held, also, that the covenant was severable, and was therefore not discharged as to the farm buildings which were substantially unaltered.

Held, also, that the owner was not entitled to use the water free of charge for his building operations at the farmhouse, nor for washing his motor cars at the farm buildings. HADHAM RURAL DISTRICT COUNCIL *v.* CRALLAN
Neville J. 138

2. —— *Supply—Restaurant—Option of Board to supply by Meter—Domestic Purposes—Trade or Manufacturing Purpose—Metropolitan Water Board (Charges) Act*, 1907 (7 *Edw.* 7, *c. clxxi.*), *ss.* 8, 16, 20, 25.

Under the provisions of s. 20 of the Metropolitan Water Board (Charges) Act, 1907, the Board are not bound to afford a supply of water otherwise than by measure to a house used as a restaurant, notwithstanding that the use to which the water is put is in its nature domestic.

The test whether any house or building is used for any trade or manufacturing purpose within the meaning of s. 20 lies in the character of the house or building and not in the use to which the water is put.

Metropolitan Water Board v. *Avery* [1914] A. C. 118 and *Frederick* v. *Bognor Water Co.* [1909] 1 Ch. 149 distinguished. ODDENINO *v.* METROPOLITAN WATER BOARD
Sargant J. 734

WAY, RIGHT OF—*Easement—Private Road—Right of Access of Owner of Dominant Tenement—Obstruction by Gates—Construction of Grant.*

Where a right of way over land laid out as a roadway is granted or reserved to the owner of adjoining land as appurtenant thereto and to every part thereof, he is not entitled to have the roadway left unfenced for ever, but to reasonable access to the roadway.

In the case of a public highway any appreciable obstruction is actionable ; but to enable the grantee of a private right of way to prevent

WAY, RIGHT OF—*continued.*

the erection of a gate across the way he must shew that it will be a substantial obstruction to his easement.

The defendant granted to the plaintiff a piece of land to the extreme south of the bulk of his own land, and an adjoining piece of land (coloured blue on a plan) to the north of the land so granted, reserving to himself, his heirs and assigns, owner or owners of a messuage and land adjoining the blue land on the north, and his and their tenants and servants, and all other persons authorized in that behalf by him and them, from time to time and at all times and for all purposes, to pass and repass, with or without animals, carts, and carriages, over and along a road ten feet wide covenanted to be made by the plaintiff on the blue land; and the plaintiff by the same deed, as beneficial owner, granted to the defendant in fee simple the same right of way "as appurtenant to the same land and every part thereof."

The plaintiff made the ten-foot road on the blue land, the defendant's fence along the middle of it being moved back to the boundary of his own land on the north. The defendant built shops on his land and at the south-east corner thereof removed his fence for some sixteen feet along the roadway, so placing his shop frontage at this point that he left a triangular piece of his own land vacant, and bounded on one side by the frontage, on another by a public highway, and on the third side by the sixteen feet of blue road. The plaintiff then put a railing along this sixteen feet and erected a gate across the eastern entrance from the highway to the blue road. The defendant promptly removed both railing and gate:—

Held, on the construction of the grant, that this was a private right of way, that it had not been substantially interfered with, and the plaintiff was entitled to erect a gate, which, however, must be kept open during business hours and must never be locked.

Held, further, that the defendant was entitled only to reasonable access to the blue road, and that the plaintiff was entitled to erect a fence with a gate in it along the sixteen feet.

Decision of Sargant J. [1914] 1 Ch. 704 reversed. PETTEY *v.* PARSONS – **C. A. 653**

WILL—*Ademption—Legacy—Particular Purpose—Bequest for Purchase of Land for Benefit of Parish Church—Subsequent Purchase and Gift of Land for like Purpose—Both Gifts in Memory of Testator's Wife—Codicil confirming Will.*

By his will dated December 31, 1904, the testator bequeathed 500*l.* to his trustees on trust to purchase land in Madley to be used as glebe for the vicarage of the parish church of Madley, and declared that he made the bequest in pursuance of the express wish of his wife to do something for the parish.

After his wife's death in 1896, the testator had told the vicar that he should like to do something in memory of his wife and that what she would have liked best would be the gift of a meadow, called St. Mary's Meadow, to the living. In 1905, the testator hearing from the vicar

WILL—*continued.*

that the meadow was for sale, purchased it for 375*l.*, and in November, 1905, conveyed it by deed to the defendant corporation in trust for the augmentation of the endowment of the incumbent for the time being of the living of the parish of Madley. The deed recited that the testator had purchased the land with the object and intention of presenting the same to the living of Madley in memory of his wife.

By a codicil dated November 17, 1911, the testator bequeathed certain legacies not affecting the above-mentioned bequest, and in all other respects confirmed his said will:—

Held, that there was no inconsistency between the bequest in the will and the gift inter vivos, which latter was the gift of a particular piece of land which was discussed before the will was made and might have been an act of spontaneous bounty quite independent of the legacy or of any moral obligation created by the wife's request to do something for the parish; that the confirmation of the will by the codicil was an important fact which could not be left out of consideration; and that there had been no ademption, either complete or partial, of the legacy. *In re* AINSLIE. KYRLE *v.* TURNER – – – – **Joyce J. 422**

2. —— *Charitable Trust—Gift for Contribution to Workpeople's Holiday—Gift to Club—Purposes to be determined by Committee—Validity—Will—Construction.*

By his will the testator bequeathed certain shares to his trustees upon trust to pay the income therefrom to the directors of a commercial company "for the purposes of contribution to the holiday expenses of the workpeople employed in the spinning department of the said company in such manner as a majority of the directors should in their absolute discretion think fit," the directors having power to "divide the same equally or unequally between such workpeople." And after other bequests the testator devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion and to hold the proceeds upon trust for the Old Bradfordians' Club, London (being a club for old boys of the Bradford Grammar School), to be utilized as the committee of the club should think best in the interests of the club or school.

In the spinning department of the company upwards of 500 females were employed at an average weekly wage of 15*s.* and twelve workpeople and overseers at 36*s.* to 37*s.* a week. There was also a holiday expenses fund to which the operatives and workpeople could, at their option, subscribe, and it was supplemented by contributions from the company:—

Held, as to the first gift, that the workpeople in question could not properly be regarded as poor people, within the statute of Elizabeth; and, further, that the trust was not one for general public purposes, but a trust for private individuals, and not being charitable was void as infringing the rule against perpetuities.

But *held* that the residuary gift did not tend to a perpetuity and was valid. *In re* DRUMMOND. ASHWORTH *v.* DRUMMOND – **Eve J. 90**

WILL—*continued.*

3. —— *Gift in Remainder to Children as a Class, but the Whole to one Child if there should be only one Child living—Survival of more than one Child — Reflecting Contingency — Will — Construction.*

Testator, who died in 1866, bequeathed to his son W. the sum of 4000*l.*, to be by him invested, in trust to pay the income to testator's daughter M. for her life, and after her death to pay the proceeds of the investments to her children, and if there should be no children of M. living at her death "then to pay over the proceeds . . . . unto the children of my said son W. in equal parts or shares, or the whole to one child, if there should be only one child living of the said W." W. died in 1903 having had eleven children, ten of whom survived him. Two other children died in 1907 and 1913, and M. died a spinster in 1914 :—

Held, that all the eleven children of W. took vested interests subject only to being divested in an event which had not happened, namely, there being only one child surviving M.

Spencer v. *Bullock* (1795) 2 Ves. Jun. 687; *Cooper* v. *Macdonald* (1873) L. R. 16 Eq. 258; *Pearce* v. *Edmeades* (1838) 3 Y. & C. Ex. 246; and *Lewis* v. *Templer* (1864) 33 Beav. 625, distinguished.

The reasoning in *Templeman* v. *Warrington* (1842) 13 Sim. 267, and the opinion of Sugden, L. C. of Ireland, in *Kimberly* v. *Tew* (1843) 4 D. & War. 139, adopted by the Court. *In re* FIRTH. LOVERIDGE *v.* FIRTH **Sargant J. 386**

4. —— *Gift of Income to Children during their Lives or to Issue of any dying before the others—Gift over after Death of all Children to Grandchildren — Implication of Cross-Remainders during Life of Survivor—Will — Construction.*

Testator specifically devised certain real estate in trust to pay the income arising therefrom amongst his children in equal shares during their lives, or to their issue in case any of them should die before the others of them, and from and after the decease of all his children then in trust to sell the same and to divide the proceeds between his grandchildren in equal shares per stirpes and not per capita; and devised his residuary real and personal estate in trust to sell the same and hold the proceeds in trust for his wife and three children. The testator died in 1910, leaving three children him surviving—(1.) Elijah, his heir-at-law, who was still living; (2.) Emile, who died in 1910, leaving one child; and (3.) Frances, who died in 1911 without issue :—

Held, that on the true construction of the will during the remainder of Elijah's life Elijah and the child of Emile were entitled in equal shares to Frances' one third share of income.

Armstrong v. *Eldridge* (1791) 3 Bro. C. C. 215; *Pearce* v. *Edmeades* (1838) 3 Y. & C. Ex. 246; and *In re Richerson* (No. 2) [1893] 3 Ch. 146 followed and applied. *In re* TATE. WILLIAMSON *v.* GILPIN – – **Sargant J. 182**

5. —— *Gift to "my cousins and half cousins" — Will—Construction.*

A testatrix, who had lived in the West Riding of Yorkshire, left property in trust for "my cousins and half cousins." She had first cousins, first cousins once removed (both upwards and downwards), second cousins, and first cousins twice removed. There was evidence that in the testatrix's neighbourhood it was the usual custom to speak of first cousins once removed as half cousins, but some slight evidence that even in that district there was some doubt about the use of the word in that precise sense :—

Held, that the term "half cousin" must have the meaning given to it in the English language as used in ordinary life; that no particular local signification should be attached to it; and that first cousins, first cousins once removed, and second cousins took under the gift. *In re* CHESTER. SERVANT *v.* HILLS **Sargant J. 580**

6. —— *Legacy to "Saint Mary's Home for Women and Children of 15 Wellington Street Chelsea" — Change in Controlling Body and Change of Site in Lifetime of Testatrix—Continuity of Home—Good Charitable Bequest for a definite Charitable Object—No Lapse.*

Testatrix bequeathed a legacy of 1,000*l.* "To Saint Mary's Home for Women and Children of 15 Wellington Street Chelsea." By a codicil she reduced to 500*l.* the amount of all charitable legacies given by her will exceeding 500*l.*, and in other respects she confirmed her will :—

Held, that the bequest was a perfectly good and valid charitable bequest for a definite charitable object, namely, the work carried on at or in connection with St. Mary's Home, and that the legacy had not lapsed notwithstanding the facts that between the date of the will and the codicil the carrying on of the rescue and preventive work at St. Mary's Home had been transferred from one association to another, though without any break in the continuity of the home or of the work carried on there, and that between the date of the codicil and the testatrix's death St. Mary's Home was removed from 15, Wellington Square—not 15, Wellington Street, as described in the will—to 14, Trafalgar Square, Chelsea.

Held, further, that neither of the associations above mentioned was entitled to the legacy, but that the same must be applied under a scheme for the benefit of St. Mary's Home, unless the Attorney-General consented to the legacy being paid to one of the defendant associations on an undertaking to apply it for St. Mary's Home. *In re* WEDGWOOD. SWEET *v.* COTTON **Joyce J. 245**

7. —— *Residue to be at Discretion of Executor and at his own Disposal—Prior Legacy in Will to Executor—Executor, whether entitled beneficially—Will—Construction.*

Testatrix by her will appointed G. B. her executor, and directed him to pay her debts and funeral and testamentary expenses. She then bequeathed various pecuniary legacies, including a legacy to G. B. "(my executor)," and concluded her will in the following terms :—"After the aforesaid legacies have been duly paid the remainder or residue of my property (if any) shall be at the discretion of my executor and at his own disposal" :—

Held, that G. B. took the residuary estate of

WILL—*continued.*

the testatrix in his capacity of executor and not as a beneficiary and held it as trustee for the next of kin of the testatrix.

Fenton v. *Nevin* (1893) 31 L. R. Ir. 478 followed.

Gibbs v. *Rumsey* (1813) 2 V. & B. 294 discussed and distinguished. *In re* HOWELL. *In re* BUCKINGHAM. LIGGINS *v.* BUCKINGHAM **Warrington J. 173**

8. —— *Shares of Residue—Period of Distribution—Advances to Residuary Legatees—Recoupment of Income to Unadvanced Legatees—Hotchpot—Will—Construction.*

A testator gave his wife the personal use and occupation during widowhood of a certain house which, subject thereto, was to form part of his devised real estate. And he made a general residuary gift of all his real and personal estate to trustees, upon trust for sale, conversion, and investment (but with full powers of postponement and retention), and declared that the resulting trust fund should be held on trust, in the first place, out of the income thereof, to pay to his wife during widowhood such a sum as, together with the income under her marriage settlement, would make up the yearly sum of 2000*l.*, and he provided that if the income of the trust fund should not in any year be sufficient to make up the 2000*l.*, the whole of the income in that year should be paid to her, and any deficiency should be made up when the subsequent income of the trust fund would permit. The trustees were (after providing for an annuity which failed) to appropriate 4000*l.* on trust for the benefit of a son P., and subject as aforesaid, testator directed that the capital and interest of the trust fund should be held in trust for such of his sons W., E., and J. and his daughters I. and D. as being sons should attain twenty-one or being daughters should attain twenty-one or marry, and so that the share of a son should be double that of a daughter. And testator gave power to the trustees, but only with the widow's consent during widowhood, to advance a certain proportion of the share of any of the children, and then settled the share of each daughter (less any sum advanced) on trust for her for life, and after her death for her children, with an ultimate trust on failure of children for her brothers equally. By a codicil he increased the widow's annuity to 3000*l.* By another codicil, after reciting that on the marriage of his daughter I. he had covenanted with her settlement trustees that his executors or administrators would after his death pay such trustees 7200*l.* with 4 per cent. interest as from his death, to be held on the trusts of the settlement, testator declared that the 7200*l.* should be taken in or towards satisfaction of the share of the daughter and her issue under the will, and should be brought into hotchpot and accounted for accordingly. By still another codicil testator provided that, if D. should marry during the wife's widowhood, the trustees might settle on her marriage a sum equal to that settled on I., which equal sum should then cease to be subject to the widow's annuity and the other will trusts, but should be taken in or towards satisfaction

WILL—*continued.*

(and the like as in the case of I.). On testator's death his executors paid the 7200*l.* to I.'s settlement trustees, and as from his death she received the income of that fund. On the marriage, after testator's death, of D., the will trustees transferred 7200*l.* to her settlement trustees free from the widow's annuity, and D. thenceforth enjoyed the income of that sum. The value of testator's estate at his death was about 80,000*l.*, and the income (even after the subtraction of both sums of 7200*l.*) was sufficient to provide for the widow's annuity and interest on the 4000*l.* trust legacy. The trustees dealt with the income and kept the accounts on the basis of *In re Hargreaves* (1903) 88 L. T. 100; and no income was paid to I. from testator's death or to D. from the date of her marriage, and there was an accumulated deficiency in respect of each of their shares. After appropriation of all charges on the income of the residue as from the testator's death to the widow's death, as between the several shares thereof, the shares of I. and D. in such income were insufficient to meet the shares of the charges so appropriated thereto respectively :—

Held, that the period of distribution was the death of the widow, and that I. and D. were not chargeable with the deficiencies down to the widow's death, but were entitled as from that date to the full income of their shares in the residuary estate after bringing the sums settled on them into hotchpot at that date.

In re Poyser [1908] 1 Ch. 828 and *In re Craven* [1914] 1 Ch. 358 followed.

In re Hargreaves 88 L. T. 100 distinguished as a peculiar case.

Semble, that *In re Rees* (1881) 17 Ch. D. 701 and *In re Dallmeyer* [1896] 1 Ch. 372 shew that in any ordinary case of a direction to bring advances into hotchpot — advances made whether by the testator himself or by his trustees pursuant to directions in his will— interest is not accumulated against advanced children between the testator's death and the period of distribution. *In re* FORSTER-BROWN. BARRY *v.* FORSTER-BROWN – **Sargant J. 584**

9. —— *Specific Bequest—Securities "standing in my name"—Foreign Government Bonds to Bearer—Custody of Testatrix's Bankers—Will—Construction.*

Testatrix specifically bequeathed all the "stocks, shares, debentures, debenture stock and all other securities which shall be standing in my name at my decease." At her decease the testatrix was possessed of foreign Government bonds to bearer which, together with certain stock certificates, were kept by her bankers in an envelope marked outside with her name and also with a reference to the page of a safe custody register kept by the bankers on which the securities were entered under the heading of her name :—

Held, that the bonds to bearer were not included in the specific bequest. *In re* MAYNE. STONEHAM *v.* WOODS – **Warrington J. 115**

10. —— *Specific Legacy with Addition of Words "as a general and not as a specific legacy"*

WILL—*continued.*

—Liability of Legacy to Abatement—Will—Construction.

A testator gave to B. a specific legacy of stocks, bonds, and shares "as general and not as specific legacies." He gave other shares in trust for B. for life and after her death to transfer such shares to P. "as a general and not as a specific legacy." He gave other shares in trust for C. for life, then to D. for life, and after D.'s death to transfer the shares to E. absolutely (omitting the words "as a general and not as a specific legacy"). The will also contained general pecuniary legacies. The estate was insufficient to pay all the legacies in full:—

Held, that the legacies to B. and in trust for B. and P., although specific, must abate with the general legacies; that they must be taken as of their value at the expiration of a year from the testator's death; and that no income of the property given was payable to the legatees in the interval. *In re* COMPTON. VAUGHAN *v.* SMITH **Sargant J. 119**

11. —— *Trust for Sale and Conversion—Direction to Trustees to pay "all death duties" out of Residue—Previous Settlement on Daughter's Marriage—Fund secured by Testator's Covenant and Charge—Duties on Settled Fund—Settlement Estate Duty—Succession Duty—Rateable Part of Estate Duty—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 14, *sub-s.* 1—*Will—Construction.*

A fund payable at a testator's death to the trustee of his daughter's marriage settlement dated September 29, 1884, was secured by the testator's covenant in the settlement and by a contemporaneous mortgage of real estate.

By his will dated April 29, 1908, the testator devised and bequeathed his residuary real and personal estate to his trustees on trust for sale and conversion and directed them to pay "all death duties" out of the proceeds.

The testator died on August 21, 1913:—

Held, that the expression "all death duties" referred to duties to which the testator's estate became liable under the dispositions of his will, and did not include duties arising under the settlement, and really payable by or recoverable from the settlement trustee.

The settlement estate duty and succession duty on the settled fund, and the rateable part of the estate duty apportionable thereon under the Finance Act, 1894, s. 14, sub-s. 1, must therefore be borne by that fund.

In re Pimm [1904] 2 Ch. 345 and *In re Hartland* [1911] 1 Ch. 459 applied. *In re* BRIGGS. RICHARDSON *v.* BANTOFT. **Astbury J. 413**

12. —— *Words of Futurity—Gift to Children of Child of Testator "who shall die in my lifetime"—Child dead at Date of Will leaving Children—Will—Construction.*

A testator bequeathed the sum of 250*l.* to his grandchildren J. and G., children of his son P., equally share and share alike should they attain the age of twenty-one years, and he gave his residuary estate "In trust for all my children living at my decease who being sons shall attain the age of twenty-one years or being daughters

WILL—*continued.*

shall attain that age or marry in equal shares . . . . Provided always that if any child of me shall die in my lifetime leaving a child or children who shall survive me and being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry then and in such case the last mentioned child or children shall take (and if more than one equally between them) the share which his her or their parent would have taken of and in the residuary trust funds if such parent had survived me and attained the age of twenty-one years." P., to the knowledge of the testator, was dead at the date of the will. The other children of the testator and also J. and G. survived him, and some of the children had attained twenty-one at the date of the will:—

Held, that J. and G. on attaining twenty-one or marriage took the share in the residuary trust funds which their parent would have taken if he had survived the testator and attained twenty-one.

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